

# THE STORY OF THE CONSTITUTION

BY

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ATTORNEY GENERAL OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

Foreword by

JOHN W. DAVIS

FORMER SOLICITOR GENERAL  
OF THE UNITED STATES

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HOWARD B. LEE

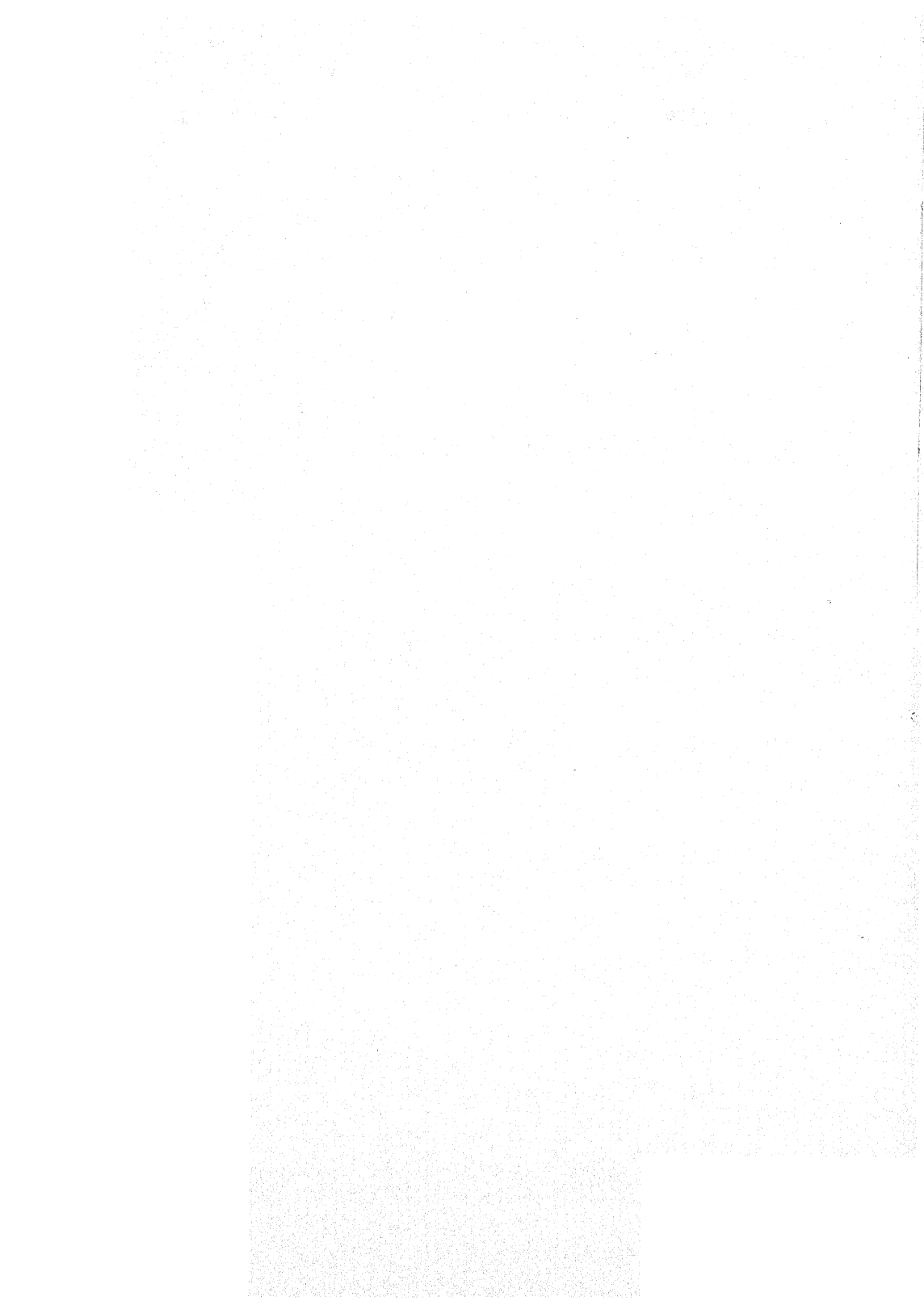


TO MY  
MOST CHARITABLE CRITIC  
MY WIFE  
IDA HAMILTON LEE  
WHOSE ENCOURAGEMENT AND ASSISTANCE  
MADE THIS VOLUME  
POSSIBLE



*People will not look forward to posterity who never  
look backward to their ancestors.*

EDMUND BURKE.



## FOREWORD

BY

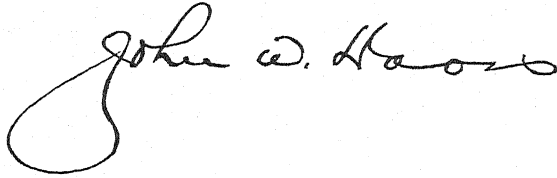
JOHN W. DAVIS

*Former Solicitor General of the United States*

IF THE average man were asked what single thing, food, clothing and shelter aside, was of most importance to any American, he might be at a loss for an answer. Perhaps the question would provoke a different reply from each person to whom it was addressed; and yet there should be no difference of opinion about it. Indubitably, the true answer is, the Constitution of the United States. For this great instrument is not only the source of our national life, it is the tireless guardian of the liberties of every individual under the flag. It furnishes the framework upon which the whole structure of every American's life, both as a man and a citizen, is built. How vital, then, it is that all Americans should be made familiar with its history, the manner of its making, the provisions it contains, the service it has performed, and what it means to him and his posterity that it should be preserved and maintained in all its vigor.

To the lawyer or the student of political history all this is familiar ground; but there is today, as there always has been and no doubt always will be, an urgent need to bring the story home to the general public, young and old alike, for ignorance of such matters is not confined to those still inside the schoolhouse walls. The tale must be told in terms such as the layman understands and uses, and not in legal phrases. It must not be so long drawn out as to insure an undisturbed

repose upon the library shelf, or so condensed as to forbid the touch of human interest that properly attends it. For a book so constructed there is always room, and it is just such a book that Attorney General Lee has furnished us. It is an excellent piece of work, and those who read it, and they should be many, will be ready to take with new fervor and deepened zeal an oath to support and defend against all enemies, foreign and domestic, the Constitution of the United States.

A handwritten signature in dark ink, reading "John W. Howe". The signature is written in a cursive style with a large, looping initial "J" and a long, sweeping underline.

*New York City*

## PREFACE

*Then, with each coming year,  
Whenever shall appear  
That natal sun  
Will we attest the worth  
Of one true man on earth,  
And celebrate the birth  
of Washington.*

GEORGE HOWLAND.

IN EVERY State of our Union the birthday of Washington is a legal holiday—a day set apart to contemplate the virtues of him who was “first in war, first in peace, and first in the hearts of his countrymen.” This year, (1932), the two hundredth anniversary of his birth, a grateful Nation bows at his shrine and pays respectful homage to the memory of “The Father of His Country.” This is eminently fitting, for the life of no man in our history affords such an inspiration to both young and old.

Throughout the entire civilized world the name of Washington is the symbol of unselfish service and orderly government. With his sword he carved our liberty from the bosom of an ancient and despotic monarchy; through his prophetic vision the foundation for the greatness of our Nation was laid in the Federal Constitution; and by his statesmanship he erected on that foundation a government of, for, and by, the people.

In no way, however, may we of this generation do greater honor to Washington than by renewing our faith in, and loyalty to, the constitutional system of government which he bequeathed to us as his most precious legacy. But such a renewal of our faith is

impossible unless we know something of the Constitution and its guaranties, and are to some extent familiar with the toil and sacrifice of those who brought it forth from the womb of time. Such knowledge and appreciation is necessary if our country is to endure. While our Constitution belongs to the people, it is not their right wilfully to destroy it, or ignorantly to impair its efficiency. Each generation holds that instrument in trust for the benefit of the next. It is ours to enjoy, but it is our solemn and sacred duty to transmit it to posterity without derogation.

Our institutions do not suffer, nor are they in danger, because of inherent defects in our organic law. There is grave danger, however, that our Constitution may become seriously impaired, if not destroyed, because of a general ignorance of its contents and a lack of appreciation of its deeper meanings and its power for good. As said by the Honorable John W. Davis in the *American Bar Association Journal*, July 1925, "The Constitution has but two enemies, whether foreign or domestic, which are in the least to be feared. The first is ignorance—ignorance of its contents, ignorance of its meaning, and ignorance of the great things that have been done in its name. The second is indifference—the sort of indifference that leads many people \* \* \* to ignore both the rights and duties of citizenship."

In recent years, however, a new enemy of our Constitution has developed, whose activities may not be ascribed wholly to ignorance or indifference. It is difficult to understand, or even vaguely to comprehend, how one who dwells within the United States, shares in its freedom, embraces its many opportunities for achievement, enjoys its protection of both life and



property, and yet would destroy it. Nevertheless, we must face the disagreeable fact that a gigantic conspiracy exists in this country today, the ultimate object of which is to destroy our last vestige of constitutional liberty. This movement is intelligently directed and adequately financed by the present tyrants of "Red Russia"—the Ishmaelite among nations. Among its minions in this country are found anarchists, agitators, radicals of every breed, certain college professors, and a few muddle-headed ministers of the Gospel.

Some of this group have joined the movement out of perverseness of heart; others, with traitorous intent, have sold their birthright for Russian gold; while the rank and file among them are simply dupes, whose ignorance of the principles of our government make them easily susceptible to such influence. However, no immediate danger is to be anticipated from the present activities of these groups; they are too much in the minority to be dangerous. The real danger lies in the possible growth of this sentiment, which, if not checked, will ultimately destroy all that man has gained in his centuries of struggle for liberty.

With the hope that it may lead to a wider and more systematic study of our Constitution, stimulate a general appreciation of its virtues, and, at least, tend to check the spread of un-American "isms" among our people, this volume is submitted to a tolerant public. It is not written for lawyers, but for business men, teachers, students, and all others who would cultivate a finer understanding of the most important political document in the history of the world. If it serves its purpose it will go far to remove the indifference which is now felt by the average citizen toward his govern-

ment, and inspire in him a greater confidence in its institutions. The creation of such a sentiment is highly important, for, as said by James Madison, "the people who are the authors of this blessing (the Constitution) must also be its guardians. Their eyes must be ever ready to mark, their voice to pronounce, and their arms to repel or repair, aggressions on the authority of their Constitution."

With the view of giving factual history, I have nevertheless endeavored to tell the story of the Constitution in a way that will both sustain the interest of the reader and entertain him. Citations of authorities have been omitted because they serve no purpose with the average reader, for whom this volume is intended.

HOWARD B. LEE.

*Charleston, W. Va.*

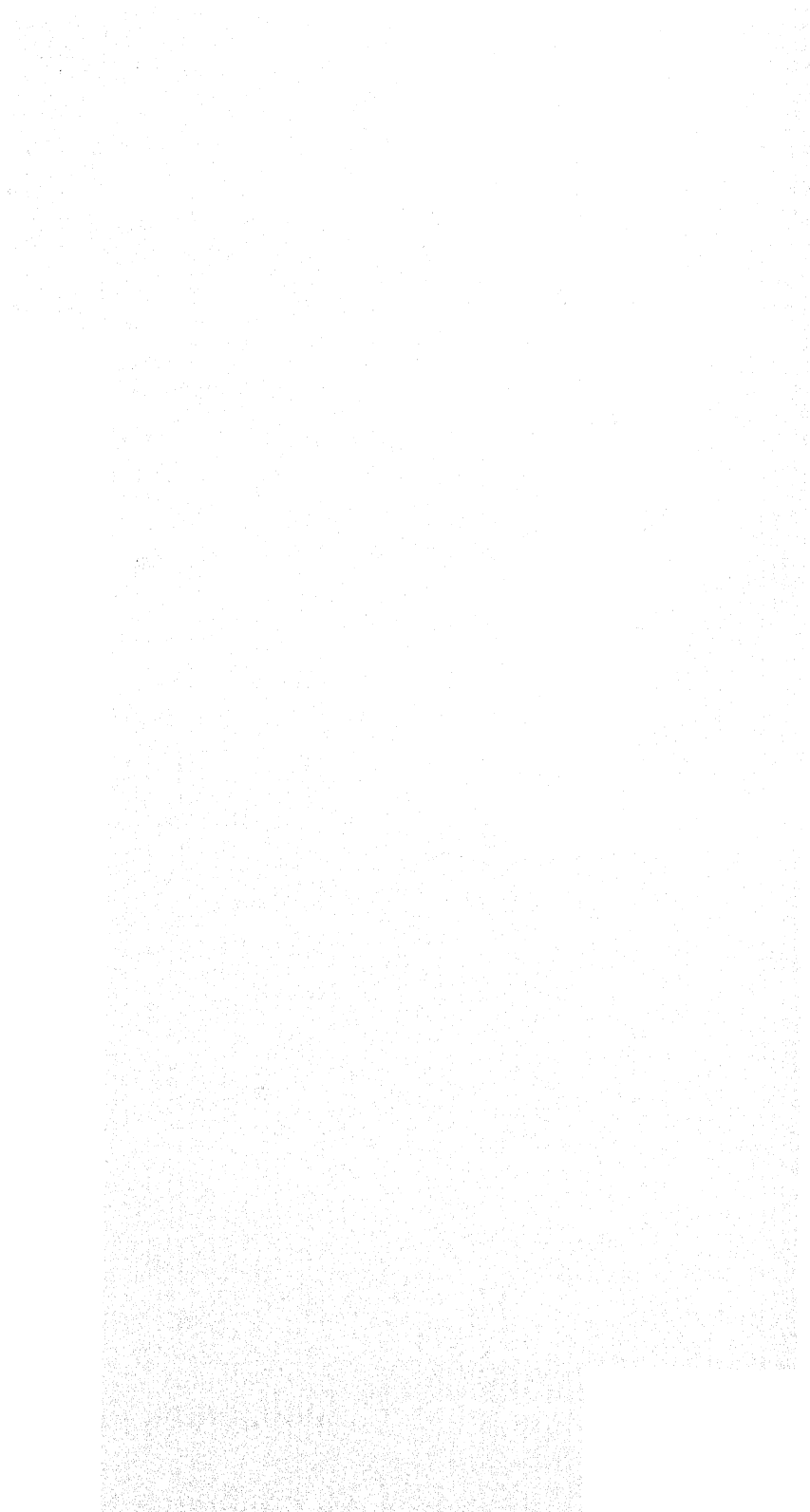
*February 22, 1932.*

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## THE STORY OF THE CONSTITUTION



# The Story of the Constitution

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## CHAPTER I

### INTRODUCTION

*There is America, which at this day serves for little more than to amuse you with stories of savage men and uncouth manners, yet shall, before you taste of death, show itself equal to the whole of that commerce which now attracts the envy of the world.*

EDMUND BURKE.

RECENTLY in an eastern city, I halted on a street corner to listen to a native American haranguing a small nondescript crowd consisting of many races. It was a typical "red" speech. The speaker assailed his own government and heaped fulsome praise on that of Bolshevik Russia. "America", said he, "has done nothing for her workers or their children. We are exploited and oppressed under a Constitution that was designed, and is now used, to oppress the poor and benefit the rich. The time has now come for the workers of America to rise and destroy this time-worn instrument of oppression."

I later talked with the speaker, and found him to be a clothing worker who had been out of employment for more than a year. During this period of enforced idleness he had read Bolshevik literature extensively and had become a convert to communism. Two things had made him highly susceptible to "red" influences. First, he had been compelled to remain idle when he needed employment; second, his education had not extended be-

yond the fourth grade of a public school, and he possessed no knowledge of the Constitution and its individual guaranties. Likewise, he knew nothing of the present Russian system of government, except what he had read in Bolshevik literature or had been told by "red" agitators, and even these things he comprehended but dimly. He was discouraged over the present economic situation, and sincerely believed that Bolshevism offered immediate relief from these conditions.

The fact that this man and thousands of others like him have lost faith in the Constitution of their country is a serious national problem which is due largely to the neglect of society itself. We maintain numerous organizations in which we frequently meet to discuss a variety of subjects of more or less superficial importance, but to the vital problems of life—our liberties and obligations under the Constitution—we are quite indifferent. We clamor loudly about our rights, but woefully neglect our duties, when in truth those rights are assured only by a full performance of our duties. Society has no moral right to condemn those who, through ignorance, fail to appreciate our Constitution as a great bulwark of human freedom, when it neglects to teach them the relation of the Constitution to their own lives and the lives of their children.

Of course, criticism of our government is not new, nor is it in itself a thing to be feared. In fact, the trite expression that the laws are "designed to make the rich richer, and the poor poorer" has done yeoman service since the days of Cleon, the demagogue. Since childhood we have heard, without alarm, similar sentiments boldly proclaimed by the uninformed. Today, however, it is no longer harmless criticism, but systematic, organ-



ized, insidious attacks, directed at the very heart of our government and its institutions.

These attacks emanate from adherents of an international organization of communists which controls a membership in this country conservatively estimated around 500,000. Their activities are directed and financed by the Third International, a world-wide communistic organization, with headquarters in Moscow, Russia. Their purpose is the utter destruction of our Constitution and all institutions based thereon. They avow allegiance to no government, recognize no God, and feel no restraint of conscience. The church and all its allied organizations are to them an anathema. Though they denounce all legitimate labor unions as "tools of the capitalistic class", and their members as "scabs and strikebreakers", they nevertheless intrude themselves into every labor disturbance with strife, not peace, as their motive. For years they have tried to destroy the United Mine Workers of America by boring from within. Recently, however, they have come out into the open, organized their own union, and are now trying to compel American miners to join their Bolshevik organization. In January, 1932, a group representing this radical union waited upon the Governor of Kentucky and demanded their support from public funds, the cessation of all deportation proceedings against foreign-born communist organizers, and the repeal of the State law against syndicalism.

At the opening of Congress in December, 1931, fifteen hundred "reds" from different sections of the country, led by nationally known communists, converged on Washington with bands playing the Internationale (Communist Hymn), demanded cash to the

amount of \$150 each, and, in addition, food and lodging at public expense. They claimed to be without funds to buy food, but paid nearly \$2,000 for their transportation to the Nation's Capital. Who financed this demonstration? A committee of the marchers visited the National Headquarters of the American Federation of Labor, and were met by a prompt order from President William Green to get out; they were told that the leaders who inspired this march were not interested in helping the working people, or in solving their economic problems, but their object was to overthrow the United States Government and substitute the Soviet Union.

The Fish Congressional Committee, which recently investigated communistic activities in the country, reports that twelve communist daily newspapers are now published in the United States, only one of which is printed in English, with a total circulation of 266,351; thirty weekly, semi-monthly, and monthly publications, eight of which are printed in English, with a total circulation of 118,397; and fifteen other publications, six of which are printed in English, distributed through channels other than the mails, thereby prohibiting any reliable estimate of their circulation. All of these publications carry propaganda of the most virulent and vicious character.

In its report the Fish Committee defines communism as "A world-wide political organization advocating: (1) hatred of God and all forms of religion; (2) destruction of private property, and inheritances; (3) absolute social and racial equality, promotion of class hatred; (4) revolutionary propaganda through the Communist International, stirring up communist ac-

tivities in foreign countries in order to cause strikes, riots, sabotage, bloodshed and civil war; and (5) destruction of all forms of representative or democratic government, including civil liberties, such as freedom of speech, of the press, of assembly, and trial by jury." The ultimate objective being world revolution to establish a communist dictatorship with its capital at Moscow.

Notwithstanding this black background, these Ishmaelites of civilization have had more earnest students of their vicious doctrines during the past few years than have those who prize the liberties which our Constitution guards and protects. So far, their ranks are made up preponderantly of those of foreign birth and tongue. Conditions among these various groups offer a fertile field for the spread of this un-American gospel. In fact, no other country in the world is faced by such a problem as confronts the United States. Most European nations, for example, are inhabited chiefly by people of one nationality, who speak the same language, while with us conditions are wholly different. During the century between 1820 and 1920, more than 32,000,000 foreigners—more than eight hundred a day—found a home in this country, the peak being reached in 1907 when 1,285,349 immigrants entered our gates. In the first eighty years of this period, ninety per cent of such immigrants came from the countries of Northern Europe. They readily adopted our customs and institutions and became American citizens. Between 1890 and the outbreak of the World War in 1914, ninety per cent of our tremendous immigration came from Southern Europe and Russia. These people, for the most part, settled in communities where they have continued to maintain their Old World habits, customs, institutions

and language, and have evinced but little interest in acquiring American citizenship. The result is, there are today more than fifty separate languages spoken in the United States; each group supporting one or more newspapers printed in their native tongue; and more than 5,000,000 persons above the age of ten years who are unable either to speak or to understand the English language.

This ultra-radical doctrine is likewise making inroads among our American stock, and its recruits from this source are not confined to the ignorant and lowly, but include men and women of intelligence from every walk of life. As is the case with our foreign born population, the endorsement of this radical scheme by our own people is, in most instances, due to ignorance. With what may be termed the *intelligentsia*, however, a different reason must be assigned. The cause for the maladjustment of this group lies deeper. In most cases they may be classed among those who are restive under restraint, who despise law and order, or who desire to take and enjoy what they have not earned, and who denounce our Government, under the Constitution, because it stands between them and the realization of their vicious ideals.

This recent increased tendency toward Bolshevism may also be attributed to a number of other causes. In periods of economic depression, many persons become despondent and instinctively grab at anything which promises even fanciful relief. Then, there is an ever present discontented labor element which feels that the wise and beneficent policies of our great labor unions are not sufficiently radical; these find a more congenial atmosphere among the communists. There is also a

small group of snobbish employers whose selfish and unreasonable attitude toward their employees, and all forms of organized labor, tends to create a feeling of dissatisfaction among their workmen, which is quickly taken advantage of by radical agitators.

Of course, communism presents no imminent national danger, though it is spreading with regrettable rapidity, especially among those of foreign birth and extraction, and among our industrial workers. It is vain to hope that by cheerfully ignoring this danger we may avert it. The public weal demands that we take all proper and necessary steps to eradicate these evils. The Fish Congressional Committee has disclosed their menacing presence, and has suggested remedies which should speedily be approved by both Congress and the country. Among other things, this Committee recommends Federal legislation to provide (1) for the revocation of the citizenship and the deportation of all foreign-born communists who have become citizens; (2) for the deportation of all alien communists; and (3) for the exclusion of all communist newspapers, magazines, literature, etc., from both the mails and interstate commerce.

While such legislation will go far toward solving the problem, the greater part of the burden must be carried by society at large. We must seriously undertake the Americanization of our people, both citizens and aliens, by teaching them the individual benefits derived from our constitutional form of government.

While many forces are now engaged in such Americanization work, the foremost agency in opposing the spread of communism in this country today is the American Federation of Labor and its affiliated labor unions.

These great organizations are ceaselessly fighting to keep their ranks purged of its destructive influence, and, so far, they have succeeded. President William Green of the Federation estimates that, in his organization of approximately 5,000,000 members, the communists number only a small fraction of one per cent. Labor deserves our heartfelt consideration for the steadfastness with which it has rejected and fought against this insidious propaganda.

In this Americanization work, however, the nation's "first line of defense" must be our public schools, colleges and universities. While such agencies have contributed, and are contributing, much in this direction, many thoughtful individuals feel today that they are not doing all that the taxpaying public, which supports them, has the right to expect or demand. When the writer was a pupil in the public schools, textbooks on civics and civil government were dry, uninteresting statements of fact, without reference to the great underlying causes which produced the Constitution, the manner of its creation, the struggle over its adoption, or its ultimate effect in the development of the nation, or upon our individual lives. Teachers, as a rule, possessed no information beyond that found in the text, and, as a result, children acquired very little knowledge of this highly important subject.

While it is true that both the quality of textbooks and the qualifications of teachers have greatly improved since our callow days, it is likewise true that the teaching of communism, especially in our higher institutions, has greatly increased. In many such institutions not a few teachers, under the guise of "liberalism" and "economic freedom", insist upon the privilege of teaching

communistic vagaries. Such teachers have no place in American school life, and the public should demand that these intellectual Bolsheviki, who thus poison the mind of youth, be driven from the classroom. We should make it definitely understood that public funds shall not be used to spread this gospel of treason.

A fine appreciation of the Constitution, and of the superior advantages offered by it, can come only from a study of the document itself, and a comparison of its possible opportunities for advancement with those offered by other governments, particularly that of Bolshevik Russia, which is looked upon as a Utopia by our American communists. Such a study is likewise highly important from a cultural viewpoint. No one knows, or can know, anything of real worth about our country until he knows its Constitution, for its history is truly the history of the Republic itself.

Such a study is also profitable from another angle. In 1776, in the first Bill of Rights written in this country, the people of Virginia said that "no free government or the blessings of liberty can be preserved to any people but by \* \* \* frequent recurrence to fundamental principles." The same year, in their Bill of Rights, the people of Pennsylvania said that a frequent recurrence to fundamental principles \* \* \* is absolutely necessary to preserve the blessings of liberty and keep a government free." This aphorism has been carried into the Constitution of every State. By it is meant that there are certain set rules in government which must be observed and followed if men are to be and remain free. In this country such rules are embodied in our Federal Constitution and Bill of Rights. They represent the climax of centuries of struggle by

the common man to protect himself from the tyranny of either the monarch or the mob; and, at this time, when it seems that many citizens, even members of Congress, have forgotten the "blessings of liberty" vouchsafed unto us by that instrument and are being swept into a maelstrom of political discontent, a recurrence to such fundamentals is of supreme importance.

The purpose of these pages is to give a brief story of the Constitution; to show the necessity for its creation; to describe the historic Convention which formulated it; to review the struggle over its adoption; to narrate the difficulties encountered by the new government; to sketch the years of bitter controversy over the interpretation of our fundamental law; to state clearly what it has meant, and now means, to the individual citizen; and to explain how this document may be amended so as to effectuate any needed change without the destruction of the instrument itself.



## CHAPTER II

### NECESSITY FOR A CONSTITUTION

*All your strength is in your union  
All your danger is in discord.*

LONGFELLOW.

ON SEPTEMBER 3, 1783, the treaty was signed which formally ended the Revolution and established the Independence of the United States. Immediately thereafter Thomas Paine published the last issue of his "Crisis", in which he said: "The times that tried men's souls are over." But the perils and hardships of the next five years "tried men's souls" even more than the dangers of war, and brought the nation closer to the brink of ruin than did the internecine struggle of the Sixties.

During the war the united efforts of the States were directed by a Continental Congress which sat from 1774 until 1781 without its powers having been defined by any written instrument, and without any authority to enforce its decrees. In 1781, however, the States adopted a written agreement called the Articles of Confederation, which created a government officially known as "The United States of America." These Articles dealt with the States only, and made no attempt at reaching the individual citizen. They not only defined the powers of Congress, but also restricted them to the extent that that body grew weaker with the passing years, until it became altogether impotent. In fact, it may be said that the government created by these Articles was wholly without means of support, and was the most inefficient state in the whole range of history.

The defects of this government are readily apparent,

even from a casual reading of the Articles. Their purpose was not to unite the States into a single political unit, but to create a "*league of friendship*" through which thirteen sovereign States would mutually aid and assist each other, each State retaining "*its sovereignty, freedom and independence.*" The utter lack of authority vested in the central government was so pronounced, and its failure so conspicuous, that just before disbanding his army, Washington wrote to the governors and presidents of the several States that it was "essential to the existence of the United States as an independent power that there be an indissoluble union of all these States under a single federal government which must possess the power of enforcing its decrees; for without such a power it would be a government in name only."

Under the Articles each State was entitled to not less than two, nor more than seven, delegates in Congress, and each State, regardless of whether it had two or seven delegates, had but one vote, upon which its delegates had to agree. No affirmative action could be taken except upon the vote of nine States; thus any five States could, and often did, block the most needed legislation. Moreover, the Articles themselves prevented any correction of their own defects, for they could be amended only by the consent of the legislature of each of the thirteen States. Several times a proposed and much needed amendment was defeated by the disapproval of a single State.

The fundamental and necessary power of taxation was not given to Congress by the Articles. That body could raise money neither through an excise tax nor by custom house duties on imports, all such powers being

retained by the States. Congress could call upon the States either for money or troops, or both, but it had no power to compel the States to obey, and oftentimes such call was either refused or ignored. Thus, during the entire life of the Articles, Congress sat as a mendicant upon the doorstep of each of the thirteen States begging alms, not only to prosecute the war but even to defray the actual expenses of the impoverished and impotent National Government.

Both before and after the adoption of the Articles, Congress shared with the States the authority to coin money and emit bills of credit. Here was the strange anomaly of fourteen sovereignties in one, and each engaged in making and circulating its own medium of exchange. Under such conditions financial disaster was inevitable, and by the close of 1780 money issued by Congress had ceased to circulate, while that issued by the States had depreciated until it was practically worthless. To meet this emergency, Congress asked the consent of the States to levy a 5% duty on all foreign importations, which request was denied, and had it not been for the timely assistance rendered the government by Robert Morris and a few other patriots from their private fortunes, the Revolution would have collapsed.

Seeing the utter hopelessness of the situation, thoughtful men everywhere were filled with despair. "A monarchy", said many, "with a good King whom all men can trust, will extricate us from these difficulties." To this end a movement was started among certain officers of the army to disperse Congress forcibly, proclaim Washington as King, and have him accept the crown at the hands of his faithful soldiers. When the

matter was laid before him, Washington repudiated the whole scheme. Fearing, however, that if the affair were made public it would cause popular distrust of the army, he ordered that strict silence be observed by all who had taken part in it.

The fiscal affairs of the government continued to grow worse, and when the war was finally over, Congress did not have, and the States would not furnish, the necessary funds to pay the soldiers. Default had also been made in the payment of the interest on money already borrowed, and our credit was ruined abroad. In the summer of 1783, even before the British had evacuated New York, Congress ordered the army disbanded because the government was afraid of it, and such fear was not without reason. In June, a number of soldiers, mutinous from lack of pay, left their camp at Lancaster, Pennsylvania, marched to Philadelphia, surrounded the state house, where Congress was in session, threw stones through the windows, and threatened to seize the members of Congress and hold them as hostages until their pay was forthcoming. Congress appealed to the State for protection, but President Dickinson was afraid to call out his militia, lest they too join the rioters. The city authorities were indifferent, and only the timely appearance of Washington, who successfully appealed to the troops to return to their quarters, prevented bloodshed. Congress, however, fled to Princeton, New Jersey, and thus the world witnessed the humiliating spectacle of a National Government too feeble to protect itself and fleeing from its own soldiers. Congress never again met in Philadelphia. It continued for a time in Princeton, then moved to Annapolis, and eventually chose New York as its permanent

place of meeting, where it continued to sit until its inglorious end—without even the formality of adjournment, and with only one member and one clerk present to witness its demise.

Peace seemed only to bring additional trials and burdens. The paper money of both the Federal and State Governments had practically disappeared, and the lack of authority in Congress to provide a national currency which would circulate at its face value, both at home and abroad, had paralyzed foreign commerce and ruined domestic trade. In a word, the entire country was on the verge of financial collapse. Then, as now, political charlatans were vigorous in proclaiming their quack remedies and, despite past experiences with worthless paper money, these mountebanks argued that there was no difference between the States making a dollar out of paper and a dollar out of silver. "This widespread distress", said they, "can be relieved only by the States printing more paper money, fixing the value thereof, and making it a criminal offense for any person to refuse to accept it." All the States, except Virginia, Connecticut, and Delaware, accepted such vagaries and enacted statutes which completed the economic ruin. Merchants refused to accept this worthless paper money in payment for goods and closed their shops, while the farmers' produce rotted in the fields. The payment of both taxes and debts was impossible; farms and other property were sold for taxes, and prisons were filled with unfortunate debtors.

Human nature, however, is so constituted that it will endure only so much. In New England the spark of rebellion, which had long been smouldering, was kindled into a flame. In Massachusetts, Daniel Shays organized

an army to resist the authority of the State. The spirit of rebellion soon spread to Rhode Island, Vermont, and New Hampshire. Courts were broken up by armed mobs, judges driven from their communities, jails opened and all prisoners released. The Massachusetts Legislature defeated a resolution requesting aid from the Federal Government in crushing the rebellion, on the ground that it was "beneath the dignity of the State to permit Federal troops to set foot on her soil." As the rebellion progressed and spread, the entire nation became alarmed lest the rebels unite and involve the whole country in domestic turmoil. Shays was eventually captured, however, and his army scattered by loyal State troops and, after the repeal of the "rag money" statutes, the disturbances elsewhere gradually died out. Thus ended Shays' Rebellion.

A fatal weakness in the Articles was the lack of a Federal Judiciary through which Congress could enforce obedience from either individuals or States. For the same reason, Congress was powerless to make effective its treaty obligations with foreign nations. Under the terms of the treaty with England, the persecution of the Tories was to cease and they were to be given an opportunity to recover their confiscated estates; British creditors were also to have unrestricted access to the courts in collecting their claims against their American debtors. The States, however, completely ignored these treaty provisions. Persecution of the Tories was in no wise abated, and British creditors were still denied access to the courts in the collection of their claims. This, in turn, gave England an excuse for refusing to fulfill certain of her treaty obligations, and she declined to surrender the western forts to the United

States. This situation caused further embarrassment by the attitude of foreign nations toward our ministers abroad in the negotiation of commercial treaties. They were invariably asked whether European nations were expected to deal with thirteen nations or one. "You are", said the French Minister to Jefferson, "one nation today and thirteen tomorrow, as may best serve your selfish interest."

Still another serious defect in the Articles was the utter lack of power in Congress to regulate commerce among the States and with foreign nations. Each State fixed and collected its own tariff duties on all importations, whether from abroad or from other States. In 1785 ten States approved an amendment to the Articles conceding to Congress the exclusive authority to regulate commerce for a period of thirteen years. But three States (Georgia, South Carolina, and Delaware) feared that the New England States would secure a monopoly of the carrying trade, and rejected the amendment. Three New England States (Massachusetts, New Hampshire, and Rhode Island) then enacted laws prohibiting British vessels from carrying goods from their ports and increasing the duty fourfold on all goods brought in by such British vessels. Such statutes were designed to give their own ship owners a monopoly of the business, and also to enable them to charge exorbitant freight rates. These measures caused great indignation in the southern States which depended largely upon British vessels to carry their cotton, rice, and tobacco to the New England markets. To secure the trade which otherwise would have gone to the three restricting States, Connecticut threw her ports wide open to all vessels, laid heavy duties on importations from the

three restricting States, and suspended all commercial relations with New York. The heavy duties imposed by New York and Pennsylvania on all importations greatly injured the farmers of New Jersey and Delaware, and these States enacted retaliatory measures. In a word, each State was engaged in a tariff war with every other State, which paralyzed business and kept the country in constant turmoil. The most serious incident growing out of such tariff war, however, was the action of New Jersey in refusing to pay her assessment of federal taxes until New York should cease discriminating against her trade. This was open secession from the Confederation of States, and meant that the disintegrating process had begun.

Another menace to national tranquility was the almost continuous disputes between States over territory and boundary lines, and the Articles afforded no effective means of settling these controversies. Through its original charter, Connecticut claimed extensive territory west of New York which included that part of Pennsylvania known as the Wyoming Valley, where many of its citizens had established homes. In the Spring of 1784, Pennsylvania sent troops into the valley, burned the homes of those settlers, and drove the inhabitants into the wilderness where many died of exposure and hunger. The resentment throughout the whole of New England was intense. Connecticut began to mobilize its troops to invade Pennsylvania, and civil war seemed imminent. In the end, however, the Pennsylvania Legislature disavowed the action of its troops and ordered that full reparation be made to the deeply wronged settlers. Thus, a serious crisis was narrowly averted.

Of equal danger were similar disputes between New



York and Vermont, and between Vermont and New Hampshire. Vermont was not yet admitted to statehood, but it adopted an aggressive policy, and boldly annexed a number of towns in New Hampshire lying east of the Connecticut River. It also extended its territory into New York as far west as the Hudson River. New York sent troops to its threatened frontier, while New Hampshire prepared to do likewise. Again, civil war seemed inevitable, but, at the critical moment, Washington appeared as peacemaker and prevailed upon the Governor of Vermont to withdraw its claims temporarily. These conflicting claims, however, were not settled permanently until after the adoption of the Constitution.

Dangerous disturbances also occurred in the South. The Territory of North Carolina extended westward so as to include the present State of Tennessee. The hardy pioneers of that region felt that the State was not furnishing them adequate protection from the Indians, and seceded. In 1784 delegates from the disaffected territory met at Jonesboro, established an independent State which they named Franklin, and selected John Sevier as Governor. The new State sent a delegate to Congress with the request that it be admitted into the Union. North Carolina warned these "backwoodsmen" to return to their allegiance. They refused, and civil strife followed, with considerable bloodshed. The agitation spread to the neighboring counties of Virginia, where many persons wished to secede and join the new State. Finally, Sevier was arrested and charged with treason, but escaped, and the State of Franklin ceased to exist. When Tennessee became a State in 1796, Sevier was chosen as the first Governor.

In this hour of black despair Washington proposed

a convention of the several States to agree upon "a plan of unity of commercial arrangement." The suggestion was acted upon immediately, and early in the Summer of 1786 the Governor of Virginia requested the other States to join with him in sending delegates to a convention at Annapolis to propose a "uniform system of legislation on the subject of trade." Only five States (New York, New Jersey, Pennsylvania, Delaware, and Virginia) sent delegates. These met September 11, 1786, but since only a minority of the States was represented, the convention took no action further than to adopt an address, prepared by Hamilton, urging each State to appoint delegates to a convention in Philadelphia the following May. The report was brought before Congress in October, but that body held that the Annapolis Convention was without authority in the premises; that such suggestions could emanate only from Congress, and declined to approve the plan.

To save the expiring government, Congress, in turn, again proposed an amendment to the Articles to permit the Federal Government to levy duties on certain importations for a period of twenty-five years. Twelve States approved the amendment, but New York declined to surrender its principal source of revenue, and the proposal was defeated. Without respect either at home or abroad, and without revenue to meet its current expenses, Congress was obliged to approve the suggestion of Hamilton for a Federal Convention "to devise provisions to render the constitution of the Federal Government adequate to the exigencies of the Union." Thus was the way paved for the great Convention at Philadelphia in 1787, which destroyed the whole vicious

scheme and gave us the framework of a government that could endure.

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*Note:* The following is a brief summary of the fundamental defects of the Articles of Confederation, all of which were cured by the Constitution:

1. The Articles did not provide for a central or supreme executive with authority to enforce Federal laws.
2. No provision was made for a central judiciary, and each State interpreted and enforced the Federal laws as it saw fit.
3. The Articles permitted concurrent legislation by the States on all vital subjects. In other words, each State could, and did, legislate as it pleased on such subjects as tariff, foreign treaties, commerce, money, etc.
4. Congress had no power to prescribe a national monetary system.
5. Congress had no power to coerce a State—it could only recommend to the States.
6. Congress had no power to enforce the observance of treaty obligations by the States.
7. Congress had no power to collect taxes or impose duties on imports for the support of the national government.
8. A two-thirds vote on all questions before Congress was required, and votes were cast by States.
9. The Articles operated upon the States only and not upon individuals. Hence, the national government had no means of punishing individuals who violated federal laws, except through State Courts, which often refused to act.
10. The Articles could not be amended without the consent of all the States.

## CHAPTER III

### THE FEDERAL CONVENTION

*The Constitution devotes the national domain to union,  
to justice, to defense, to welfare and to liberty.*

WILLIAM H. SEWARD.

**D**URING the Revolution a common fear kept the States working together. But they were so intoxicated by their individual sovereignty, that no strong sentiment in favor of a "more perfect union" developed. The events of the next five years, however, were sufficient to convince a sorely distressed people that if the country was to continue its existence as an independent nation, something must be done, and done quickly, to strengthen the central government. To that end, the Convention which drafted our Constitution assembled in Philadelphia on May 14, 1787, in the same room in which the Declaration of Independence had been signed eleven years before. It was May 24, however, before a quorum arrived. The following day a permanent organization was effected, with Washington as President and Major William Jackson as secretary. Only eleven States were represented. Rhode Island declined to participate because it feared the loss of control over its commerce. New Hampshire was so impoverished that, at first, it did not have the funds necessary to defray the expenses of its delegates; consequently, they did not arrive until July 23,—six weeks after the opening of the Convention.

Sixty-five delegates were chosen by the twelve participating States, but ten failed to take their seats. Among these were Patrick Henry of Virginia and Willie Jones of North Carolina, both of whom declined,

and Richard Caswell of North Carolina, who resigned. Neither Madison's Journal nor the records of the secretary give any reason for the absence of John Pickering and Benjamin West of New Hampshire, Francis Dana of Massachusetts, John Neilson and Abraham Clark of New Jersey, and George Walton and Nathaniel Pendleton of Georgia. Of the fifty-five who actually participated in the deliberations of the Convention, on the last day thirteen had either gone home or were absent because of illness or other reasons. Of those present three, Edmund Randolph and George Mason of Virginia, and Elbridge Gerry of Massachusetts, refused to sign the completed document, leaving only thirty-nine who immortalized themselves by signing the final draft of the Constitution. Each of the twelve participating States, however, were represented among the signers, Hamilton signing alone for New York.

Beyond all doubt, this Convention was the most far-reaching political event in all the horologe of time. Never were more important problems submitted to any assembly for solution than were presented to the framers of our Constitution. Upon the result of their deliberations depended the destiny of a Nation and the future happiness of unnumbered millions of people. The old Confederation was already dead and had this attempt failed, such indescribable confusion would have followed as would have indefinitely delayed, if not entirely dissipated, every possibility of a union among the States.

The Convention worked behind closed doors, and the delegates were pledged to secrecy as to what transpired. No information was given out until the work was finished, and then the public was given only the completed document. Madison, however, kept a private journal

of each day's proceedings, but this was not made public until after his death, fifty years later. To this are now added the later discovered notes kept by Yates, King, Pierce, Paterson, Hamilton, and McHenry. These journals, together with the meager record kept by the secretary, constitute the only authentic information available concerning the debates and decisions of the great Convention.

From these sources it is clear that the Convention was far from harmonious. Perfect accord, however, could not be expected in a deliberative body which so ably represented the various sections, interests, and opinions of the country. The fear of the larger States felt by the smaller ones had to be dissipated; the opinions of the northern abolitionists, Rufus King and Gouverneur Morris, had to be harmonized with those held by the pro-slavery Pinckneys; and the views of those who favored State regulation of commerce had to be made to comport with those who just as strongly favored National control. The greatest cleavage, however, was upon the question of whether the State governments or the proposed National organization should be supreme. One group maintained that a central sovereignty was an essential condition of union, and demanded the complete supremacy of the National government over all citizens and States. The other group as stoutly declared that the end in view could be successfully accomplished only by subordinating the National authority to the States, and the maintenance of the competing interests of many nations within a league. In later years this doctrine became popularized under the historic name of State Sovereignty or State Rights,—the great internal enemy of the Union.

These differences of opinion were so pronounced at times as to threaten a dissolution of the Convention. Compromise and conciliation, however, held a majority together, and they worked with the spirit urged by Washington in the only address he made during the entire proceedings. When some palliative measure was proposed as more likely to find favor with the people, Washington arose and, in tones vibrant with suppressed emotion, said: "It is possible that no plan we suggest will be adopted. Perhaps another dreadful conflict is to be sustained. If, to please the people, we offer what we ourselves disapprove, how can we afterwards defend our work? Let us raise a standard to which the wise and the honest can repair; the event is in the hands of God."

This sage advice was indeed most timely, for the Convention was soon thrown into a furor by Governor Randolph, who presented the "radical" plan of the Virginia Delegation, which had been formulated by Madison the previous year, and which provided for a National Legislature of two Houses. Members of the Lower House were to be elected directly by, and represent, the people instead of the States; while members of the Upper House were to be selected by the Lower House from a list of persons nominated by the State Legislatures. In both Houses membership was to be apportioned according to the number of free inhabitants or to the amount of property. Votes were to be cast by individual members, and not by States, as in the Congress of the Confederation. The proposed National Legislature was to have the power of original legislation, and also the authority to hold State laws unconstitutional. To carry out all Federal laws, a National executive and judiciary

were provided, the executive to be chosen by the National Legislature for a short term. Charles Pinckney, Wm. Paterson, and Alexander Hamilton also presented plans for a government. These plans were all similar in character and were based largely upon the principles stated by Pelatiah Webster of Philadelphia in a document published in 1783.

The decision of the Convention to use Randolph's proposal as a working basis, greatly alarmed the delegates from the smaller States, who foresaw in it an attempt to destroy the equality of the States. Such equality, they declared, must be the basis of any proposed Union. In vain did the larger States argue the absurdity of giving a State like Georgia, with 100,000 population, equal representation with Virginia, which had 750,000 population. The delegates from the smaller States were adamant, and asserted that if such a course were persisted in, they would immediately withdraw from the Convention. The absence of Rhode Island and New Hampshire at this time was most fortunate. Had they been represented, it is highly probable that they would have joined with the other smaller States and either adjourned the Convention, or given us a feeble enlargement of the old Articles of Confederation. As it was, the dissolution of the Convention seemed inevitable, but after several days of acrimonious debate, Ellsworth and Sherman of Connecticut came forward with what has ever since been known as the "Connecticut Compromise." In substance, this proposal retained the principle of individual voting, but provided that in the Lower House representation should be based on population, while in the Upper House it should be according to States, each of which, regardless



of size, was forever to be entitled to two Senators. The acceptance of this compromise, by the close vote of five to four, completely won the smaller States and paved the way for a government that could endure.

With the small States won over, it now became a contest between Slave States and Free States, and the second great compromise involved the vexatious problem of Negro slavery. In fact, the seventy years' struggle between the anti-slavery and the pro-slavery forces, which culminated in the Civil War, actually started in this Convention. The immediate question was whether slaves were to be counted as persons in determining the basis for representation in the Lower House of Congress. The delegates from the Northern States argued that slaves were not represented in the legislatures of the States in which they belonged and, therefore, should not be considered in fixing a basis for representation in the National Legislature; that in such States slaves were regarded as property and should not be represented any more than any other species of property; that slaves did not vote, and that such a basis would make the vote of a southern white man count for more than that of a white man in the north. But the delegates from South Carolina and Georgia replied that slaves were a part of the population and as such must be counted, or else their States would refuse to enter into the proposed new government.

The situation was again critical. It would require nine approving States to put the new government into operation. New York and Rhode Island were known to be bitterly opposed to it, Massachusetts was doubtful and, to add South Carolina and Georgia, and possibly North Carolina, to this list, would make failure inevita-

ble. Therefore, both South Carolina and Georgia had to be placated.

Four years before, under the Articles of Confederation, when Congress was apportioning the amount of taxes each State should pay, which was based on population, the Northern States had contended that slaves were a part of the population and should be counted. The Southern States had as stoutly maintained that they were property and should not be counted. Their positions were now precisely reversed. In Congress, Madison had proposed a compromise, whereby one slave was figured as three-fifths of a freeman, which was accepted. In this emergency, he again came forward with the same suggestion, which was agreed to, and the second crisis safely passed.

The third great compromise likewise involved the question of slavery. All the States, except South Carolina and Georgia, wished to stop the importation of slaves. Again, the pro-slavery Pinckneys declared they would consider such a vote an invitation to South Carolina to remain out of the Union. There was also another point of pronounced disagreement. The Southern States feared to grant to Congress the sole power to regulate commerce, unless all navigation laws were required to be passed by a two-thirds vote. The Northern States, however, were determined that such power should be lodged in Congress, and that only a majority vote should be necessary to pass all laws relating thereto.

Here was ample room for compromise, which was finally effected by the Northern States agreeing to continue the importation of slaves for an additional period of twenty years, and the Southern States conceding to Congress absolute control over both foreign and inter-

state commerce, with authority to enact navigation laws by a majority vote. While the benefits derived from the latter concession have been incalculable, in that it secured absolute "freetrade" between the States, the lack of which was the chief defect of the Articles of Confederation, it nevertheless struck terror to the hearts of the ultra States Rights advocates and precipitated the bitter fight over the adoption of the Constitution. In fact, the day this compromise was reached, July 5, Yates and Lansing of New York deserted the Convention and went home in disgust. Martin of Maryland remained until August 14, when he, too, withdrew for the same reason. Randolph and Mason of Virginia and Gerry of Massachusetts continued until the end, but it was this compromise which caused them to refuse to sign the Constitution.

Many noble men and women have since deprecated these compromises respecting slavery. Because of them, William Lloyd Garrison declared the Constitution to be "a league with death and a covenant with hell." However, it was these great compromises, made in the spirit of patriotism, that laid the foundation for our Constitution. In fact, without such compromises, a union of the States and a strong central government would have been impossible. The Nation, it is true, has paid an awful price for our seventy years of slavery, but even its horrors and all its attendant evils are not comparable with what would have happened in this country with thirteen insignificant nations, torn by anarchy and engaged in constant petty wars with their neighbors.

With these compromises effected, all that remained was to work out the details of the proposed government. Three distinct branches were created—the Legislative,

Executive, and Judicial—the powers and duties of each being clearly defined, consequently no one branch may perform the duties or exercise the prerogatives of the other. This conception of limitation of powers, however, was not original with the Convention. After the Revolution, all the States had adopted constitutions, many of which embodied the same principle. Massachusetts, in adopting its Constitution in 1780, had declared that “In the government of this commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them—to the end that it may be a government of laws and not of men.”

The Constitution, as finally agreed upon, divides the legislative branch into two Houses, styled the Senate and the House of Representatives, the two together being designated as Congress, in which is vested all legislative power. The Senate consists of two members from each State. Originally Senators were chosen by the Legislatures of their respective States, but since the adoption of the Seventeenth Amendment in 1913 they have been elected by popular vote. (See XVII Amendment, Chapter VII). One-third of the members of the Senate are elected every two years, and hold their office for a term of six years. All members of the House of Representatives are elected by popular vote every two years. Senators must have attained the age of thirty years and Representatives twenty-five years. Each House is the judge of the “*elections, returns, and qualifications of its own members.*” The number of Repre-

sentatives allotted to each State, until after the first census, was fixed by the Constitution, and was, thereafter, to be based on population—not to exceed one Representative for every thirty thousand population. Congress has from time to time changed the number of Representatives allotted to the several States, the last Act being passed in 1912. The Congress is required to assemble on the first Monday in December of each year. However, should the proposed Twentieth Amendment be approved Congress will convene on January 3 of each year. (See XX Amendment, Chapter VII).

The executive authority is vested in a President, chosen for a term of four years by electors from the several States, each State selecting as many electors as it has Senators and Representatives in Congress. The electors are required to meet at their respective State Capitols, cast their ballots and transmit the same to the President of the Senate. In a joint session of both Houses of Congress the ballots are opened, counted, and the result declared. Eligibility to the Presidency is restricted to "*a natural born Citizen, or a Citizen of the United States at the time of the Adoption of this Constitution*", who has "*attained to the Age of thirty-five years, and been fourteen years a Resident within the United States.*" A Vice-President is also provided, who is elected in the same manner as the President, and assumes the office of President upon the death, resignation, or inability of that officer to discharge the duties of his office. The President's duties are designated as Commander-in-Chief of the Army and Navy; granting reprieves and pardons (except in cases of impeachment) for offenses against the United States; negotiating treaties with the advice and consent of two-thirds of the

Senate; appointing and commissioning ambassadors, ministers, judges, and all other officers of the United States; furnishing Congress with information concerning the state of the Union; convening Congress in special session on extraordinary occasions; receiving ambassadors and ministers from foreign countries; approving or disapproving of all laws enacted by Congress; and, above all, "*he shall take Care that the Laws be faithfully executed.*"<sup>1</sup>

Section 1, Article III, of the Constitution vests "*the judicial power of the United States \* \* \* in one*

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1. The President is assisted in the performance of his duties by the heads of the ten Executive Departments who collectively constitute the President's Cabinet. The appointment of the members of this advisory body has been authorized by Congress from time to time in the absence of any specific constitutional provision. It may be said, however, that the provision in section 2, Article II, of the Constitution, which authorizes the President to "*require the opinion, in writing, of the principal officer in each of the executive departments*", indirectly authorized the creation of such an advisory body.

With the exception of the heads of the Department of Justice and the Post Office Department, who are officially designated as the Attorney General of the United States and the Postmaster General, respectively, the heads of all departments are officially called secretaries of the departments. In Washington's administration the Cabinet consisted of the Secretary of State, Secretary of the Treasury, and Secretary of War. The Attorney General was not made a member of the Cabinet until 1814. The Navy Department was under the Secretary of War until 1798, when Congress established it as a separate department with the chief as a member of the Cabinet. The Post Office Department was a branch of the Treasury until 1829, when it was likewise made a separate department with the head a member of the Cabinet. The Department of the Interior was created in 1849, Department of Agriculture in 1889. The heads of these Departments were made members of the Cabinet. In 1903 the Department of Commerce and Labor was created. In 1913, however, it was divided into the Department of Commerce and the Department of Labor, and the executive head of each accorded Cabinet rank. All members of the Cabinet are appointed by the President, with the consent of the Senate, and hold office through the administration or at the pleasure of themselves or the President.

*Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish."* The Supreme Court, therefore, is the only Federal Court specifically established by the Constitution, but the number of Justices on such Court is left to the discretion of Congress. Under the authority of this constitutional provision Congress created the following "*inferior courts*": Circuit Courts of Appeals, District Courts, a Court of Claims, a Court of Customs Appeals, and the Courts of the District of Columbia.<sup>1</sup>

Section 2, Article III, of the Constitution provides that the jurisdiction of the Federal Courts "*shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies be-*

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1. The first Supreme Court consisted of one Chief Justice and five Associate Justices. It was organized February 2, 1790, with the following members present: John Jay, Chief Justice, and John Rutledge, William Cushing, James Wilson, and John Blair, Associate Justices. William Hanson Harrison declined, and James Iredell was appointed in his place on February 9, 1790. Three of the members of the first Court, Rutledge, Wilson and Blair, had been members of the Constitutional Convention and signers of the Constitution; while Jay, Iredell and Cushing had warmly favored its ratification by their respective States. The present membership of the Court is one Chief Justice and eight Associate Justices. They are appointed by the President and confirmed by the Senate. Once confirmed, however, neither the President nor Congress has any further authority over them. They hold their office for life or during good behavior, and may be removed only by death, resignation, or impeachment for "high crimes and misdemeanors." Only once has a member of the Supreme Court been impeached,—Associate Justice Chase—and he was acquitted. Six members of the Court constitute a quorum, and a majority of those present is necessary for a decision.

*tween two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”* The Eleventh Amendment, however, modifies this grant of power to the extent that States may not be sued “*by citizens of another state, or by citizens or subjects of any foreign state.*” (See Eleventh Amendment, Chapter VII).

The jurisdiction of the Supreme Court of the United States is both original and appellate. The second paragraph of Section 2, Article III, of the Constitution provides that “*In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original jurisdiction.*” The term “original jurisdiction,” as here used, did not confer *exclusive* jurisdiction of all such matters upon the Supreme Court. The judiciary Act of 1789 invested District Courts with jurisdiction in all matters affecting consuls and vice-consuls, (*Bors v. Preston*, 111 U. S. 252). Section 2, Article III, also provides: “*In all other Cases before mentioned, (Section 2), the Supreme Court shall have appellate Jurisdiction both as to law and fact, with such exceptions, and under such Regulations as the Congress shall make.*” This means that any suit, action, or proceeding, other than those in which the Supreme Court is given original jurisdiction, must first be brought in an “*inferior court*” and prosecuted to judgment; after which an appeal will lie to the Supreme Court, unless Congress has provided otherwise.<sup>1</sup>

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1. The lowest of the “*inferior courts*” are the United States District



The most difficult, as well as the most original, work of the Convention was the apportionment of the powers of government between the proposed Federal and the existing State Governments. Experience under the Confederation had taught that certain powers must be lodged in the former. Therefore, in Section 8, Article I, of the Constitution the Convention gave to the national organization the exclusive power (1) to lay and collect taxes, duties, imposts and excises; (2) to pay the debts of the United States; (3) to provide for the common defense and general welfare; (4) to borrow

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Courts. In some instances the smaller States constitute one District, while the larger States are divided into from two to four Districts. Each District has at least one Judge who is called a District Judge. The jurisdiction of these District Courts extends to all cases assigned by section 2, Article III, of the Constitution to the Federal Judiciary, except those cases in which the Supreme Court has original jurisdiction. The most common of these cases are criminal prosecutions for counterfeiting, and violation of the prohibition, postal, and internal revenue laws. They also have jurisdiction in bankruptcy and admiralty matters.

Appeals from the District Courts are taken to the Circuit Courts of Appeals. These Courts are ten in number, and are next in rank to the Supreme Court. By an Act of Congress the United States is divided into ten Circuits, in each of which is a Court. Such courts are composed of from three to six Judges who are required to be residents of their respective Circuits. The Chief Justice and Associate Justices of the Supreme Court are allotted among the Circuits by an order of the Supreme Court. Judges of the District Courts are also competent to sit as Judges of the Circuit Courts of Appeals. Appeals do not lie from the District Courts to the Circuit Courts of Appeals in cases involving the constitutionality of State statutes. All such cases must be heard by a District Court of three Judges, one of whom shall be a Justice of the Supreme Court, or a Circuit Judge. In such cases appeals are taken direct to the Supreme Court of the United States.

Like Justices of the Supreme Court, Judges of the District Courts and Circuit Courts of Appeals are appointed by the President and confirmed by the Senate. They hold their office for life or during good behavior, and may be removed only by death, resignation, or impeachment for "high crimes and misdemeanors."

money on the credit of the United States; (5) to regulate foreign and interstate commerce; (6) to control naturalization and bankruptcy; (7) to coin money and fix the value thereof; (8) to fix the standard of weights and measures; (9) to establish post offices and post roads; (10) to grant patents and copyrights; (11) to declare war; (12) to grant letters of marque and reprisal; (13) to raise and support armies; (14) to maintain a navy; (15) to suppress insurrections; (16) to repel invasions; (17) to maintain diplomatic relations with foreign nations, etc. Then to provide for contingencies which might arise, not clearly covered by these enumerated powers, the Convention added a sweeping clause to this section, known as the "Necessary and Proper Clause", which empowers Congress "*To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or officer thereof.*" It is under this clause, as first interpreted by Hamilton, that the far-reaching doctrine of *implied powers* in the Constitution has been developed. (See Chapter VI).

From the history of the past, the framers of the Constitution also understood that governments sometimes usurped powers. To prevent a repetition of such usurpations, the framers of the Constitution deemed it prudent specifically to enumerate those things which Congress might not do. Therefore, in Section 9, Article I, of the Constitution, they expressly declared that Congress is prohibited from (1) suspending the writ of *habeas corpus* except in time of rebellion or invasion; (2) from passing bills of attainder and *ex post facto* laws; (3) from laying taxes and duties on articles ex-

ported from any State; (4) from giving preference to the ports of one State over those of another in any matter respecting commerce; and (5) from granting titles of nobility. These restrictions, however, were deemed insufficient by a great number of people; accordingly, the First Ten Amendments were submitted to the States by the First Congress and declared approved December 15, 1791. They are further limitations upon the powers of Congress and are discussed at length in Chapter VII.

To prevent encroachment upon the powers of the Federal Government by the States, as well as to protect citizens of the United States from unfair discrimination through State legislation, Section 10, Article I, provides that States may not enter *into any Treaty, Alliance or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in the Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.* Nor may any State, *"without the Consent of Congress, lay any imposts or Duties on Imports or Exports, \* \* \* or lay any Duty of Tonnage"* on shipping.

Article VI, declares that the Constitution and the *"Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the Land."* It may not be inferred from this, however, that the Federal Government is supreme over the States. The States are not subordinate to the National Government in the sense that they may be commanded by it. The United States is a government whose powers are strictly enumerated in the

Constitution, and it is only in respect to the powers so enumerated that it is supreme.

The Tenth Amendment provides that "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*" Hence, all powers not conferred upon the Federal Government by the Constitution, nor denied to the States in that instrument, are reserved or residuary powers of the States, and in the exercise thereof the States are supreme. This principle was clearly stated by Madison in *The Federalist*, when he wrote: "The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation and foreign commerce, with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State."

But why, it is sometimes asked, did the framers of the Constitution enumerate the powers conferred upon the Federal Government and leave those so reserved to the States open to conjecture and uncertainty? The answer is simple. The powers reserved to the States are too comprehensive for enumeration, for they embrace all those social and business relationships which go to the very foundations of law and order. They include the whole domain of civil and religious liberty, contracts, principal and agent, master and servant, utility regulation, education, suffrage, marriage, divorce, domestic

relations, business, property, trade, taxation, and the administration of most of the criminal laws.

It is well to note that the Constitution as finally approved did not represent any individual plan of government; nor was it in complete harmony with the views of any group or section. On the contrary, it was a compromise, every delegate patriotically conceding something in the interest of his country. It is this feature which gives added strength to our fundamental law, and makes it adaptable to the needs of every section of our Republic.

When the document had been agreed upon in substance, it was turned over to a committee headed by Gouverneur Morris, an adept in the use of correct English, to be put in proper form. This committee freed it of all redundancy and ambiguousness and reported it to the Convention in its present form on September 17, when it was signed by the thirty-nine approving delegates and ordered to be laid before Congress, with the request that that body submit it to the people of each State (not the States), the source of all authority, for ratification by "a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature."

The Convention further ordered that a letter of explanation, signed by its President, George Washington, be transmitted to the Congress along with the Constitution. This communication is not only a contemporaneous interpretation of the Constitution itself, but clearly shows its objects and the spirit in which the delegates labored. The letter reads:

"In Convention, September 17, 1787.

Sir:

We have now the honor to submit to the considera-

tion of the United States in Congress assembled, that Constitution which has appeared to us the most advisable.

The friends of our country have long seen and desired that the power of making war, peace, and treaties, that of levying money, and regulating commerce, and the correspondent executive and judicial authorities, should be fully and effectually vested in the General Government of the Union; but the impropriety of delegating such extensive trust to one body of men is evident; hence results the necessity of a different organization.

It is obviously impracticable in the Federal Government of these States to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be preserved; and, on the present occasion, this difficulty was increased by a difference among the several States as to their situation, extent, habits, and particular interests.

In all our deliberations on this subject, we kept steadily in our view that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety—perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each State in the Convention to be less rigid on points of inferior magnitude than might have been otherwise expected; and thus, the Constitution which we now present is the result of a spirit of amity, and of that mutual deference and concession, which the peculiarity of our political situation rendered indispensable.

That it will meet the full and entire approbation of every State is not, perhaps, to be expected; but each will, doubtless, consider, that had her interest alone been consulted, the consequences might have been particularly disagreeable or injurious to others; that it is liable to as few exceptions as could reasonably have been expected, we hope and believe; that it may promote the lasting welfare of that Country so dear to us all, and secure her freedom and happiness, is our most ardent wish.

With great respect, we have the honor to be, sir, your excellency's most obedient and humble servants. By the unanimous order of the convention.

George Washington, President.

His Excellency, the President of Congress."

This final session of the Convention was indeed a dramatic scene. With the completion of their great work, many of the delegates seemed appalled by the tremendous possibilities of their joint labors. Franklin, Hamilton, Gouverneur Morris, and a few other delegates, in well chosen remarks urged all delegates to append their names to the completed document. "No man's ideas", said Hamilton, "are more remote from the plan than my own are known to be; but is it possible to deliberate between anarchy and convulsion on one side and the chance of good to be expected from this plan on the other." Washington sat with bowed head, as if in prayer and meditation. Deeply agitated, Randolph expressed the fear that in refusing to sign the completed document he might be taking the most awful step of his life, but it was dictated by his conscience and he could not change. Gerry declared that he firmly believed that the proposed Constitution would divide the country into opposing factions, whose bitterness would

bring on the convulsion which the Convention had sought to avert, and, therefore, he could not sign. Mason sat silent; but he, too, refused to sign.

Notwithstanding its far-reaching effects, it may well be doubted whether a single delegate participating in that momentous event had more than a slight conception of the ultimate result of his labors. It may have been given to the aged Franklin, however, like Moses, figuratively to ascend the Mount Nebo of his imagination and catch a fleeting glimpse of what was then only a "Promised Land." As the completed document was being signed, that aged seer looked toward the President's chair, on the back of which was emblazoned a half-sun, and remarked that artists had found it extremely difficult in their art to distinguish between a rising and a setting sun. "I have", said he, "often and often in the course of the Session, and the vicissitudes of my hopes and fears as to its issue, looked at that behind the President without being able to tell whether it was rising or setting. But now at length I have the happiness to know that it is a rising and not a setting Sun."

Not unlike our modern law-making bodies, the Convention had its obstructionists or irreconcilables. These were Yates and Lansing of New York, Martin of Maryland, Gerry of Massachusetts, and Mason of Virginia. With them the States were supreme, and they resisted every effort to create a strong central government. On the whole, however, their influence was salutary. They probably prevented the acceptance of Franklin's plan to vest all legislative power in a single house. They also defeated Hamilton's scheme to elect the President and Senators for life. They likewise killed Madison's plan to lodge with the Supreme Court the power to veto any



legislation which it thought to be unwise or inexpedient. The acceptance of any one of these provisions would have wrecked the Constitution before it was adopted, or at least it would have given us a form of government wholly different from that which we possess.

What of the personnel of the Convention? Who were the men who thus conceived, planned and laid the foundation for the future efficiency and influence of our Nation? What was the political philosophy and experience of those who labored so successfully to give to a despairing people a form of government which should thereafter command the admiration and emulation of mankind?

The delegates represented no particular class or section, but were as cosmopolitan a group as could have been assembled. In private life they were merchants, farmers, financiers, doctors, educators, soldiers, and lawyers. The lawyers, however, predominated, numbering thirty-one. Twenty-five were from north of the Mason and Dixon line, and thirty from the Southern States. Of the thirty-nine who signed the Constitution, nineteen were from the North and twenty from the South. Eight were of foreign birth; these were Alexander Hamilton, William Paterson, James Wilson, Robert Morris, James McHenry, Thomas FitzSimons, William R. Davie, and Pierce Butler. Eight had the honor of having signed the Declaration of Independence; these were Benjamin Franklin, James Wilson, Robert Morris, Roger Sherman, George Read, George Clymer, George Wythe, and Elbridge Gerry. In addition, Franklin had also signed the Treaties of Alliance and Commerce with France in 1778, and the Treaty of Peace with Great Britain in 1783.

Only two of the fifty-five, Washington and Franklin,

were internationally known—the former as an unselfish soldier and leader in a great and successful revolution; the latter as a scientist, philosopher, diplomat, and America's most versatile genius of the Eighteenth Century. In prestige and influence, Washington ranked first among the delegates. Franklin was the wisest; Hamilton the most brilliant; Madison the most sagacious; while the others, for the most part, were national figures. Seven had been Governors of States, while all but twelve had been members of Congress.

On the whole, the delegates were better equipped for their great task than any prior or subsequent law-making body in our history. Thirty were college men, and twenty-six had degrees from the leading colleges of Europe and America, which fact does not seem so extraordinary when we consider that, when the Constitution was written, Harvard College was one hundred and fifty years old; William and Mary one hundred; Yale seventy-five; and Princeton fifty. Moreover, with the educated colonist the study of government had been almost a passion since the first settlement was planted in America nearly two hundred years earlier. Through the study of the writings of Montesquieu, Locke, and other political writers of the time, the delegates were familiar with the elements of strength and weakness of all governments, both ancient and modern. In addition, they had acquired an experience for constitution-making in colonial legislatures, state constitutional conventions, Continental Congress, and in the Congress of the Confederation. They were also patriots who had but recently emerged from a life and death struggle for liberty, in which they had served their country as soldiers in the field, in the Continental Congress, or in the diplo-

matic service, and were determined that the wrongs endured under the English King should never be repeated under the government they should create. They saw the lowering clouds of anarchy which darkened the skies in every State, and threatened the destruction of all for which they had hoped and fought, and were highly resolved to unite the States into a government that would endure.

To those who think that age is a prerequisite to sound judgment, this assembly affords a striking lesson, for it was composed of comparatively young men. Jonathan Dayton, the youngest member, was twenty-six years of age; John Francis Mercer, twenty-eight; Charles Pinckney, twenty-nine; Hamilton, whose genius had been touched into a flame by the grim chemistry of war, thirty; Davie, thirty-one; Randolph, thirty-four; Gouverneur Morris, thirty-five; Madison, who contributed so largely to the plan that he was afterwards known as "The Father of the Constitution", thirty-six; McClurg, the substitute for Patrick Henry and the most skillful surgeon in the Revolution, forty; Ellsworth, forty-two; Paterson, forty-two; Mifflin, forty-three; Wilson, forty-five; Washington, the Ulysses of the Revolution, fifty-five; Franklin, the Nestor of the Convention, eighty-one; while the average age was only forty-two. But, regardless of age or occupation they were patriots and statesmen of the highest order and, in their deliberations, displayed none of the cowardice of timeservers or the low cunning of demagogues.

Of the thirteen delegates who were absent from the final session of the Convention, only four—Martin and Mercer of Maryland, and Yates and Lansing of New York—are known to have been definitely opposed to the

Constitution. Ellsworth of Connecticut, McClurg and Wythe of Virginia, Davie and Martin of North Carolina, Pierce and Houstoun of Georgia, and Strong of Massachusetts, strongly supported it. History is silent as to the attitude of Houston of New Jersey. Of the three who were present at the final session and refused to sign the Constitution, Randolph later favored ratification by his State, while Mason and Gerry led in the fight in their respective States against it.

Seven of the delegates—Brearley, Franklin, Houston, Jenifer, Livingston, Mason, and Sherman—died shortly after the Convention. History is silent as to any later political activity of eleven. The others, however, contributed mightily in building the infant nation. Washington and Madison each became President; Ellsworth and Rutledge, Chief Justices; Wilson, Blair, and Paterson, Associate Justices; Hamilton, Secretary of the Treasury; Bedford, Attorney General; Randolph, Attorney General and Secretary of State; Gerry, Vice-President; while the others became United States Senators, Members of Congress, Judges of Federal Courts and of State Supreme Courts, Governors, etc. Madison was the last survivor. He lived to see “the great American experiment”, as John Ruskin called our country, so largely his brain child, pass into lusty youth and become firmly established among the nations of the earth. Full of years and honors, he passed away at the ripe old age of eighty-five—nearly fifty years after the adjournment of the great Convention.

The thirty-nine delegates who were present at the final session of the Convention and signed the Constitution were:

"Go. Washington—Presidt and deputy from Virginia."

## New Hampshire:

John Langdon  
Nicholas Gilman

## Massachusetts:

Nathaniel Gorham  
Rufus King

## Connecticut:

Wm. Saml. Johnson  
Roger Sherman

## New York:

Alexander Hamilton

## New Jersey:

Wil: Livingston  
David Brearley  
Wm. Paterson  
Jona: Dayton

## Pennsylvania:

B. Franklin  
Thomas Mifflin  
Robt. Morris  
Geo Clymer  
Thos. FitzSimons  
Jared Ingersoll  
James Wilson  
Gouv Morris

## Delaware:

Geo: Read  
Gunning Bedford, jun  
John Dickinson  
Richard Bassett  
Jaco: Broom

## Maryland:

James McHenry  
Dan of St. Thos. Jenifer  
Danl. Carroll

## Virginia:

John Blair  
James Madison, Jr.

## North Carolina:

Wm. Blount  
Richd. Dobbs Spaight  
Hu Williamson

## South Carolina:

J. Rutledge  
Charles Cotesworth Pinckney  
Charles Pinckney  
Pierce Butler

## Georgia:

William Few  
Abr. Baldwin

The three delegates who were present at the last session of the Convention and refused to sign the Constitution were:

## Massachusetts:

Elbridge Gerry

## Virginia:

Edmund Randolph  
George Mason

The thirteen delegates who were absent on the last day of the Convention were:

Massachusetts:

Caleb Strong

Connecticut:

Oliver Ellsworth

New York:

John Lansing

Robert Yates

New Jersey:

Wm. C. Houston

North Carolina:

Alexander Martin

Wm. R. Davie

Maryland:

John Francis Mercer

Luther Martin

Georgia:

Wm. Pierce

Wm. Houstoun

Virginia:

George Wythe

James McClurg

The following named persons were appointed as delegates to the Convention, but never took their seats:

New Hampshire:

John Pickering

Benjamin West

Massachusetts:

Francis Dana

New Jersey:

John Neilson

Abraham Clark

North Carolina:

Richard Caswell (Resigned)

Willie Jones (Declined)

Georgia:

George Walton

Nathaniel Pendleton

Virginia:

Patrick Henry (Declined)

## CHAPTER IV

# RELATION OF THE CONSTITUTION TO THE DECLARATION OF INDEPENDENCE

*The Declaration of Independence and the Constitution of the United States are parts of one consistent whole, founded upon one and the same theory of government,—that the people are the only legitimate source of power, and that all just powers of government are derived from the consent of the governed.*

JOHN QUINCY ADAMS.

THE sources of our Constitution would be extremely difficult to ascertain. One thing, however, is certain; it was not, as stated by Gladstone, "struck off in a given time by the brain and purpose of man." Governments are not thus created; they grow out of the past. Constitutions are not "struck off" in a single convention; they are the slow, deliberative work of ages. The fabric of human institutions is a texture that can be woven only in the loom of time.

The history of many of the clauses of our Constitution dates back a thousand years. Some were taken from the Magna Charta. Others were copied from the English Constitution, and other European systems of government of that time. In truth, it represents the best thought of thoughtful men everywhere, who vainly struggled for centuries toward liberty. In the light of their experience, the makers of the Constitution wrought the achievements of the past into a code of political and civil liberty that secured every right which the people

had wrested from despotic power during the contest of the ages; which has stood the test for nearly a century and a half; and which is still the surest and safest foundation for a free government that has never been devised.

Many of the clauses of the Constitution also owe their origin to the Declaration of Independence. The thunderclap of July 4, 1776, not only sounded the doom of English rule in America, but also announced to the world the birth of a Nation—a Nation founded upon the broadest principles of individual liberty of thought and action. From the facile and brilliant pen of Thomas Jefferson there poured forth with extraordinary charm and lucidity an avowal of wrongs endured, and rights proclaimed, which fired the minds of all men with a new conception of liberty and nationalistic aim.

With the force of divine inspiration, that Declaration proclaimed the innate truth that "*all men are created equal*", and upon that foundation this Republic has been builded. By that simple statement the founding fathers meant that under the government which they planned to erect on this continent, all men should have equal opportunity, equal chance in life, equality before the law, and equal access to the resources of life, liberty, and the pursuit of happiness. To found a government that would give to all men, regardless of birth or wealth or position or creed, this equal chance in life, was the aim, the faith, the hope, the glory spoken in the Declaration of Independence, and subsequently embodied in our Constitution—an equality vouchsafed unto the people by no other government in all the world at the time our Constitution was written.



The Declaration of Independence and the Constitution are companion documents—the latter being a corollary of the former. Into the Constitution were written positive guaranties against a repetition of those wrongs and usurpations of government which had been decried and “submitted to a candid world” in the Declaration. In a word, both of these great state papers were based upon the theory that the people are the source of all authority, and that all just powers in government are derived from the consent of the governed.

The Congress which adopted the Declaration of Independence, July 4, 1776, sat in Philadelphia in the same room in which the Constitution was drafted eleven years later, and eight of its members signed the latter instrument. It was composed of fifty-six members, one more than participated in the Constitutional Convention, and all of the Colonies were represented. On July 4, however, the Declaration was signed by only John Hancock, President of the Congress, and on July 8, the country had its first Independence Celebration. On August 2 the document was signed by all members, except Matthew Thornton of New Hampshire who was absent, but his signature was added early in November.

The men who thus challenged the power of England, by proclaiming the Declaration of Independence to an astounded world, were worthy representatives of those hardy pioneers who fought the savages, felled the forests, cleared their fields, and built their homes along the fringes of the grim Atlantic. They were great in faith, supreme in courage, supereminent in character, and unafraid. Their profound grasp of life's fundamental problems and their understanding of man's duty to his

God, his country, and his fellowman was neither cloyed with selfishness nor hardened by success, and they served their country as ardently as they believed in God. As builders of a Nation no man or group of men in all history is deserving of greater praise or higher honors than are those patriots who affixed their signatures to the Declaration of Independence. They risked everything, and mutually pledged to each other their lives, their fortunes, and their sacred honor in the success of their tremendous undertaking.

The following comparison of these two great state papers will show how the wrongs decried in the first were forever constitutionally prevented in the second:

#### DECLARATION OF INDEPENDENCE

He (the King) has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, \* \* \* .

He has refused to pass other laws for the accommodation of large districts of people, \* \* \* .

He has endeavored to prevent the population of these States; for that purpose obstructing the laws for naturalization of foreigners; \* \* \* .

#### CONSTITUTION

A bill if vetoed by the President may be repassed by two-thirds of both Houses of Congress.

The Congress shall have the power to lay and collect taxes, duties, imposts, excises, etc.

The President has no power to prevent Congress from enacting a law.

The Congress shall have the power \* \* \* to establish an uniform rule of naturalization.

He has dissolved representative houses repeatedly, for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected, \* \* \*

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries.

He has kept among us, in times of peace, standing armies, without the consent of our legislatures.

Congress shall meet at the seat of government once each year; the President has no power to dissolve Congress, except when the two Houses cannot agree on the times of adjournment.

The time, place and manner of holding elections for Senators and Representatives, shall be prescribed by each State by the legislature thereof.

The jurisdiction of Federal Courts is fixed by Congress which represents the people.

Federal Judges are appointed for life; they are not responsible to the President; their salaries may not be reduced during their continuance in office, and they may be removed only by impeachment by Congress, which represents the people.

Congress shall have the power to raise and support armies, and to provide and maintain a navy.

He has combined with others (Parliament) to subject us to a jurisdiction foreign to our constitutions, and unacknowledged by our laws; giving his assent to their acts of pretended legislation.

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever;

For quartering large bodies of armed troops among us;

For imposing taxes on us without our consent;

For depriving us, in many cases, of the benefit of trial by jury;

For transporting us beyond seas, to be tried for pretended offenses;

The trial of all crimes shall be held in the State and district wherein they shall have been committed.

The President has no power to suspend Congress, or to prevent its assembling once each year.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Congress shall have power to levy and collect taxes.

The trial of all crimes, except in case of impeachment, shall be by jury.

All trials shall be held in the State and district wherein the crimes shall have been committed,

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, \* \* \* so as to render it at once an example \* \* \* for introducing the same absolute rule into these colonies; (this referred to the refusal in 1774 to extend the law of *habeas corpus* to Canada).

For taking away our charters and altering fundamentally the forms of our government.

The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require.

Every State of the Union is guaranteed a republican form of government, which may not be altered either by the President or Congress.

These guaranties were written into the Constitution for the protection of the common man. Its framers, however, did not stop with securing the people against the wrongs and injustices enumerated in the Declaration of Independence, but went even further and erected insuperable barriers against those other governmental tyrannies and usurpations that for centuries had destroyed the liberties and crushed the aspirations of mankind.

## CHAPTER V

### THE STRUGGLE OVER RATIFICATION

*The union of lakes, the union of lands,  
The union of States none can sever,  
The union of hearts, the union of hands,  
And the flag of our Union forever.*

GEORGE POPE MORRIS.

ON SEPTEMBER 20, 1787, the proposed Constitution was formally laid before Congress. The first move of the opposition, led by Richard Henry Lee, a member of that body, was to strangle it by preventing Congress from transmitting it to the several State Legislatures. In the meantime, James Madison, who had resumed his seat in Congress, successfully met every objection and, after eight days of debate, that body formally transmitted the Constitution to the various State Legislatures, to be submitted by them to the people in delegate conventions.

Upon this issue the people, for the first time, divided into two national political parties—the Federalist and the Anti-Federalist. The former zealously advocated the adoption of the Constitution, and were led mainly by the delegates who favored it in the Convention. The latter opposed its approval with equal zeal, and were directed by three of the greatest pre-Revolutionary patriots—Samuel Adams, “Father of the Revolution”, the aged but still fiery Patrick Henry, and Richard Henry Lee, who, eleven years before, had moved the adoption of the Declaration of Independence. Allied with this powerful triumvirate were the irreconcilables of the Convention — Yates, Lansing, Luther Martin, Gerry,

and Mason—and the powerful, but selfish, Governor of New York, George Clinton.

In some instances, this opposition to the Constitution was based wholly on local self-interest; in others, on sectional prejudice, due largely to a lack of the means of communication among the States; in still others, it involved matters of national import. In the perspective of nearly a century and a half, however, it is difficult now to comprehend why men of that day were so convinced of the dangers inherent in the form of government presented to them for adoption. It would seem impossible that Richard Henry Lee should assert that if the Constitution should be adopted “either a tyranny will result from it, or it will be prevented by a civil war”; or that Patrick Henry and Thomas Jefferson should believe that the President could “make himself king and enslave the American people”, or that Luther Martin should report to the Maryland Legislature that the purpose of the Constitution was “the total abolition of all state governments and the erection upon their ruins of one great and extreme empire.”

One charge of the opposition, at least, was true, namely, that the Convention had exceeded its authority. It was called for the purpose of amending the Articles of Confederation. Instead, it discarded the old government entirely, and proceeded to create a new one. Although bloodless, the proposed new government and the method prescribed for its adoption were just as much a revolution as had been the destruction of English Rule in America. In the first place, instead of referring the proposed change to the various State Legislatures for approval, as provided in the Articles of Confederation, the Constitution required it to be submitted

to a convention in each State, delegates to be elected by the people for the sole purpose of approving or rejecting it; second, the Constitution, when adopted, wholly destroyed an existing government and established another in its place.

In every State the "machine politicians" vigorously opposed the proposed change because they saw in the new order the end of their regime as "bosses" of independent States. In general, however, there was substantial opposition, especially in the larger States. In Virginia, Patrick Henry and many of the Anti-Federalists thought that conditions in the various parts of the country were too diverse to admit of regulation by one body, such as the proposed Congress. Hence, they urged the Southern States to reject the Constitution and set up a "Southern Confederacy." Ratification by Georgia and South Carolina, however, destroyed Henry's dream, and thereafter his opposition was based on other grounds. Virginia and North Carolina, whose territory then extended as far west as the Mississippi River, also feared that the treaty-making power lodged with the President and the Senate might be used so as to concede to Spain the right to close the mouth of that great waterway to free navigation. New York was adverse to passing the revenue derived from her custom house over to the National Government. Both Rhode Island and North Carolina demanded that their worthless paper money be recognized and made the equivalent of gold and silver. The present State of Maine was then a part of Massachusetts, and the people of that territory feared that the adoption of the Constitution might prevent their later admission as a separate State.

Only one objection was raised in all the States,



namely, that the Constitution contained no Bill of Rights. In the Convention, on September 12, 1787, it was moved by Elbridge Gerry and seconded by George Mason that a committee be appointed to prepare a Bill of Rights to be included in the Constitution. The motion, however, was rejected by the unanimous vote of the States present, on the grounds, as stated by Sherman, that "the State Declaration of Rights are not repealed by this Constitution; and being in force are sufficient." The wrongs endured under an obstinate and tyrannical English King, however, were still fresh in the minds of the people, many of whom looked with disfavor upon the Constitution because it did not include a Bill of Rights securing them against encroachment by the proposed government.

With much justification, Hamilton argued in *The Federalist*, No. 84, "that the Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights; that the proposed government is one of enumerated powers", and "why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" While Hamilton was probably right in this construction, yet, in view of the strength and bitterness of the opposition because of this omission, it may be said that the failure of its framers to include in the Constitution more specific personal guaranties was probably a mistake.

The smaller States, Delaware, New Jersey and Georgia, however, were wholly satisfied with the compromises made in the Convention, and they accepted the new form of government without a dissenting vote.

Without serious opposition Connecticut, Maryland and South Carolina approved it by large majorities. From the beginning, however, it was apparent that the new order would fail without the cooperation of the larger States. Hence, the Anti-Federalists centered their fight in Pennsylvania, Massachusetts, Virginia, New York and North Carolina, where the struggle was carried on with a bitterness that has never been equaled in any other political campaign in our history.

The Anti-Federalists were strongly imbued with a belief in the complete sovereignty of the States, or States Rights, as it was later known. The theory of this doctrine was that the citizen was not in contact with the National Government, that he owed allegiance to his State only, and that the State, in turn, dealt with the Federal organization. Such sentiments, however, may not be ascribed to a lack of patriotism, for they were held by many able and sincere patriots. It was rather a state of mind, which was the natural outgrowth of events and experience. In the Declaration of Independence the Colonies had declared themselves to be "Free and Independent States", with full power to do all "Acts and Things which Independent States may of right do", and they had confirmed that Declaration in a trial by battle. The Revolution had left them as thirteen sovereign nations, and in their Articles of Confederation they had refused to surrender their sovereignty, but entered into a mere treaty which they styled a "league of friendship", each State retaining "its sovereignty, freedom and independence." That sovereignty was the thing for which they had fought until they were bled white, and they were fearful of surrendering any part of it, even to a central authority of their

own creation. It was quite natural, therefore, that some should oppose the surrender of any part of this dearly-bought and highly-prized independence to the proposed new government.

The leaders of the opposition, for the most part, were the "old patriots of '76", and their campaign consisted mainly of ridicule and denunciation. They declared that the proposed Constitution was "fantastic and unworkable \* \* \* the wild experiment of visionary young men—mere boys—whose impudence in asserting their own opinions as against those held by the elder statesmen was surpassed only by their conceit; that the whole plan was subversive of liberty, and would result in the domination of the few and the slavery of the many"; that it was aimed at the destruction of the States and all State Governments. That the situation was bad, they readily admitted; still, they offered no remedy.

The Federalists, however, had a marked advantage in that they offered a concrete plan for the cure of existing evils. In addition, they had the prestige which came from the powerful influence of Washington, who briefly summed up the whole Federalist argument in a message to the people of Massachusetts. "The Constitution", said he, "is the best form of government that can be obtained at this time. We must choose between it and disunion and anarchy. If it is imperfect, a constitutional door is open for amendments which may be adopted in a peaceable manner, without tumult or disorder."

Three of the "mere boys"—Hamilton, Madison, and Jay—won immortal fame by the publication of a series of essays explaining every vital clause of the Constitution. Of these eighty-five letters, all signed "Publius",

Hamilton wrote fifty-one, Jay, five, and Madison, twenty-nine. They were published in newspapers and in pamphlet form, read widely, and became the Federalist campaign textbook. Later, they were collected and published in one volume called *The Federalist*—one of the truly great books of the world, and still the most comprehensive exposition of the Constitution extant.

The influence of these publications upon the result was immeasurable. Their unanswerable logic gave the people a larger vision and a nobler nationalistic aim, against which the narrow, provincial, selfish argument of the opposition was impotent. In a letter to Hamilton, written after ratification was accomplished, Washington expressed his view of *The Federalist* as follows: "When the stringent circumstances and fugitive performances which attend this crisis shall have disappeared, that work will merit the notice of posterity, because in it are candidly discussed the principles of freedom and the topics of government which will always be interesting to mankind so long as they shall be connected in civil society."

The first struggle came in Pennsylvania. Its legislature, which consisted of a single House, was in session when the Federal Convention adjourned on September 17, 1787. A general election, however, was to be held on the first Tuesday in November. It was the plan of the Anti-Federalists to wage a vigorous campaign, secure a majority in the new legislature, and prevent the calling of a convention to consider the Constitution. But the Federalists were too astute to be caught in a situation that might prove so disastrous. Without waiting even for Congress to submit the Constitution formally to the various legislatures, George Clymer, a

Federalist member, who had also sat in the Convention, introduced a resolution calling a convention to consider the proposed form of government. The Anti-Federalists declared the resolution to be out of order, but were overruled. There were sixty-two members, and forty-seven were necessary for a quorum. Nineteen were bitter Anti-Federalists, and to prevent the passage of the resolution, they absented themselves from the legislative chamber. The forty-five Federalists dispatched the sergeant-at-arms to bring in the absentees, but they defied him. An adjournment was then taken until the next morning, when a number of citizens broke into their room, seized two Anti-Federalist members, forcibly took them to the legislative chamber, and held them in their seats until the resolution was passed. Before the vote was taken, however, a messenger arrived with the news that Congress had submitted the Constitution to the States, which eliminated all doubt as to the legality of the proceedings.

The chief objections of the Pennsylvania Anti-Federalists to the Constitution were, that it required votes in Congress to be cast by individuals and not by States; that it provided for the payment of the salaries of members of Congress out of the Federal Treasury, thus rendering them independent of their respective States; that it required an oath of all Federal officers to support it; that it gave Congress the unlimited power of taxation; that it gave too much power to the Federal Judiciary; and, finally, that it did not contain a Bill of Rights.

The campaign was brief, but bitter. The eastern counties favored the new order, but in the less populous counties of the west the people were violently opposed to it, and threats of armed rebellion were frequently

heard. At Carlisle an armed mob broke up a Federalist meeting and publicly burned a copy of the Constitution.

In these days of prohibition, one reason for this antagonism is most interesting. For many years, the people along the Appalachian Mountains from Pennsylvania to Georgia had engaged in the illicit manufacture of whiskey, and they looked with disfavor upon a central government strong enough to enforce a more regular collection of an excise tax on their product. In Washington's administration this opposition culminated in an armed uprising called the "Whiskey Rebellion", which required the Federal Army for its suppression.

In Pennsylvania, the Anti-Federalists were without leaders of either standing or prominence, and it was soon apparent that the day was going against them. In their desperation they became reckless and began a war of abusive pamphlets and stump speeches, in which they attacked the makers of the Constitution with a rashness characteristic of the defenders of a losing cause. They branded Washington as a "born fool" and Franklin as an "old dotard". Finding themselves hopelessly outnumbered in the Convention, they resorted to filibustering, but the eloquence and logic of that great Scotchman, James Wilson, who later became an Associate Justice of the Supreme Court, beat down all opposition, and the Constitution was ratified on December 12, 1787, by a vote of 46 to 23.

Although Pennsylvania was the first among the States to call a convention, it lost the distinction of being the first to ratify the Constitution. That honor went to little Delaware which called its convention for December 6, 1787, and unanimously accepted the pro-

posed new government on the 7th—five days before Pennsylvania accepted it. New Jersey and Georgia followed on December 18, and January 2, respectively, by the unanimous vote of their conventions. On January 9, Connecticut, the fifth State, accepted it by a vote of 128 to 40.

The fight now centered in Massachusetts which called its convention for January 9, 1788. The Federalist forces were led by Rufus King, Caleb Strong, and Nathaniel Gorham—three of the delegates to the Federal Convention. They were ably assisted by young Fisher Ames, whose eloquence was soon to become so famous. The irreconcilable Elbridge Gerry marshalled the forces of the Anti-Federalists, and was covertly assisted by Samuel Adams, “Father of the Revolution”, and Governor John Hancock, President of the Convention.

In the light of the present the objections to the Constitution raised in the Massachusetts Convention are highly interesting. It was argued that a two-year term for members of Congress was entirely too long; that a federal district ten miles square was too large an area in which to permit Congress to “wreak its tyrannical will without let or hindrance—a district one mile square would be large enough”; that the power vested in the proposed government to maintain a standing army foreboded tyranny; that the “President as Commander in Chief of such army could make himself a Cromwell”; that the Constitution did not recognize the existence of a God; that it required no religious test for federal officers; that under it “a Papist or Infidel was as eligible to hold office as a Christian”; that too much power was delegated to the Federal Government; that the people could not support such an elaborate system; that it did

not contain a Bill of Rights; and, finally, that the entire system was conceived by lawyers who expected to get into Congress, manage the government to suit themselves, and "swallow up us little folks just like the whale swallowed Jonah."

For weeks the angry debate went on. The situation looked hopeless, when two events turned the tide: First, Washington threw himself into the fray with a message to the people of the State which undoubtedly changed many votes; second, the Revolutionary patriot, Paul Revere, called a mass-meeting of the people of Boston, who expressed their views so forcibly as to change the reluctant Samuel Adams. The Federalists now proposed to ratify the Constitution unconditionally and at the same time propose certain amendments, in the nature of a Bill of Rights, to be acted upon when the new government should go into operation. On February 6, 1788, this plan was accepted and the Constitution ratified by the narrow majority of 187 to 168, "in full confidence that the amendments proposed will soon become a part of the system."

In spite of the rabid opposition of Luther Martin, Maryland approved the new government on April 28, 1788, by a vote of 63 to 11. South Carolina, the eighth State to accept the Constitution, opened her Convention on May 12, following. The opposition was unable to overcome the powerful influence of the Pinckney and Rutledge *dynasties*, and on May 23, the new order was approved by a vote of 149 to 73.

The ratification of but one more State was now necessary, and all eyes were turned on Virginia whose Convention met on June 2, 1788. In ability and character the delegates were second only to those in the Conven-



tion at Philadelphia. Of the distinguished statesmen of the Commonwealth, only Washington and Jefferson were absent. The latter, who was then Minister to France, wrote from Paris that he was both for and against ratification, and, therefore, had but little influence in the Convention. The former, however, from his home at Mount Vernon, directed the Federalist campaign. Among the leaders in the Convention were James Madison, master spirit of the Federalists and a future President; John Marshall, later Chief Justice; Edmund Randolph, Governor of the State; Edmund Pendleton, President of the Convention; George Wythe, Chancellor of Virginia; and General Henry (Light Horse Harry) Lee, Revolutionary hero and father of Robert E. Lee. At the head of the Anti-Federalists was Patrick Henry, the chief critic and most savage assailant of the Constitution. He was ably supported by James Monroe, later President; George Mason, William Grayson, John Tyler and Benjamin Harrison, the last two, fathers of future Presidents.

Besides sincerely opposing a strong national government, there was a strong element of selfishness in Virginia's opposition to the proposed form of government. At that time, her planters owed English merchants over \$10,000,000 and her legislature had passed an act suspending the right of such merchants to sue for their money in the State Courts. The State, therefore, was particularly opposed to Section 10, Article I, of the Constitution, which forbids a State to pass any "*law impairing the obligation of contracts*", and which would deprive her citizens of the advantage secured by the State statute.

On their respective sides Henry and Madison bore

the brunt of the fight which lasted twenty-three days. The former spoke on eighteen separate days. On each of several days he made three speeches; on one day, five, and on another day, eight. One of his speeches lasted seven hours. While Madison spoke less often, his labors were no less onerous. Of the two, Henry was the more eloquent, but Madison surpassed him in reasoning power and logic. Of these two giants, John Marshall later said that "of all the men he had ever known, Henry had the greatest power to persuade, while Madison had the greatest power to convince." Second only to Madison in the debates, were John Marshall and Governor Randolph. By his brilliant advocacy of the Constitution in Richmond, the latter largely atoned for his failure to sign it at Philadelphia. His was the last voice to be raised in its defense in the Convention. Just before the vote was taken, and with reference to his own vote about to be cast, he said: "\* \* \* for every other act of my life, I shall seek refuge in the mercy of God—for this I request His justice only."

Henry savagely attacked the Constitution as forming one gigantic consolidated government which destroyed the States and all "State Sovereignty"; that it established a "covenant among the people instead of a league between the States"; that the first clause should read "We the States", instead of "We the people"; and that it contained no Bill of Rights. In the office of President he foresaw "the likeness of a kingly crown"; and in the control of the "purse and the sword", as vested in Congress by the Constitution, he discerned "the extinction of liberty." Henry's tremendous efforts occupied nearly one-third of the time of the Convention and so alarmed the Federalists, that on June 23, Chan-

cellor Wythe offered a resolution (similar to that adopted in Massachusetts) ratifying the Constitution, but proposing certain amendments to be submitted to the people by the first Congress to be convened under the new government. Henry opposed it with equal tenacity, and offered a counter resolution to require the amendments to be added before ratification. Upon his substitute resolution, Henry spoke three times. His second speech, on June 24, is famous as his "thunderstorm oration", in which he seemed to surpass himself. Of this speech, one delegate later said that as he "listened to Mr. Henry, he sensed the doors of the dungeon closing upon him, heard the clank of the chains, and felt the fetters tightening on his wrists." As Henry reached his powerful climax, he cried: "I see the awful immensity of the dangers with which it (the Constitution) is pregnant. I see it. I feel it. I see beings of a higher order anxious concerning our decision."

"When, lo!" says Wirt, "a storm at that instant rose, which shook the whole building, and the spirits he had called seemed to come at his bidding. Nor did his eloquence or the storm immediately cease; but availing himself of the incident, with a master's art, he seemed to mix in the fight of his ethereal auxiliaries, and, 'rising on the wings of the tempest, to seize upon the artillery of heaven, and direct its fiercest thunders against the heads of his adversaries'. The scene became insupportable; and the House rose without the formality of adjournment, the members rushing from their seats with precipitation and confusion."

Had a vote been taken at the conclusion of Henry's speech, undoubtedly the Constitution would have been rejected. But the next day, the phantoms built up by

Henry were beaten down under the crushing blows of Madison's irresistible logic. Henry's substitute resolution was lost, and Wythe's resolution to ratify adopted by a vote of 89 to 79, and thus ended the most spectacular convention ever held in America.

That Patrick Henry was mistaken in his view that the Constitution would destroy the States and all State Governments has been fully demonstrated. In fact, it has been judicially determined. In *Texas v. White*, 7 Wall. 700, the Supreme Court said: "The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States."

However, we should not judge Patrick Henry harshly. His opposition to the Constitution was not due to unpatriotic impulses, but rather to mistaken judgment as to the ultimate effect of that instrument. On the whole, his opposition served a wholesome purpose, for it forced the adoption of the first Ten Amendments, thus placing him among the great makers of the Constitution. When his native State had spoken, Henry patriotically declared "I am no longer a Virginian; I am an American." Henceforth, his fast dying energies were directed toward securing the new Government in the affections of the people of his State.

In that historic Virginia drama the territory embraced in what is now West Virginia played a conspicuous role. With the exception of that part of the present State which was embraced in Montgomery County, the entire territory was then divided into eight counties, each

represented by two delegates. The counties and delegates from each were: Berkeley, William Darke and Adam Stephen; Greenbrier, George Clendenin and John Stewart; Hampshire, Andrew Woodrow and Ralph Humphreys; Hardy, Isaac Vanmeter and Abel Seymour; Harrison, George Jackson and John Prunty; Monongalia, John Evans and William McClurg; Ohio, Archibald Woods and Ebenezer Zane; and Randolph, Benjamin Wilson and John Wilson. Out of a total of sixteen votes only one, that of John Evans of Monongalia County, was cast against ratification. Thus West Virginia furnished five more than the ten majority by which the convention ratified the Constitution of the United States.<sup>1</sup>

The prolonged debate deprived Virginia of the distinction of being the ninth State to adopt the proposed new Government. On June 21, two days before the vote in Virginia, the New Hampshire convention ratified the Constitution by a vote of 57 to 46. The vote in

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1. The present Counties of Fayette, Logan, Mercer, Mingo, McDowell, Raleigh, and Wyoming, all in West Virginia, and the Counties of Bland, Buchanan, Carroll, Floyd, Giles, Grayson, Pulaski and Tazewell, in Virginia, were then included in the territorial limits of Montgomery County, which was represented by Walter Crockett and Abraham Trigg. They came from the section of the county which now lies in the State of Virginia, and each voted against ratification of the Constitution.

Virginia then included the whole of the present State of Kentucky, which was divided into five counties. These counties, the delegates who represented them, and the vote of each, were as follows: Fayette, Humphrey Marshall, *yes*, John Fowler, *no*; Jefferson, Robert Breckenridge, *yes*, Rice Bullock, *yes*; Nelson, Matthew Walton, *no*, John Steele, *no*; Madison, John Miller, *no*, Green Clay, *no*; Mercer, Thomas Allen, *no*, Alexander Robertson, *no*. The opposition of the Kentucky delegates was caused by their fear that the treaty-making power, under the Constitution, might be used, under a treaty with Spain, to close the Mississippi River to free navigation.

Virginia, however, was no less decisive, for there are grave doubts whether the new government would have succeeded, with the most populous State holding aloof.

Unfortunately for the country, this disturbing doctrine of State Sovereignty, so ardently championed by Patrick Henry, did not die with the triumph of the Constitution. The differences became even greater and the antagonism more bitter with the passing years. The growth of population, development of territory, and increase in wealth only complicated the issue with fresh interests and increased the danger by adding strength and confidence to the opposing forces. Foreseeing the cataclysm into which the Nation was drifting, many able but despondent statesmen vainly tried to compromise those divergent and, at times, belligerent views. But the differences were too fundamental for mediation or conciliation to settle permanently. In the end one side had to prevail, the other had to submit. At the critical period, however, came Lincoln, the equal of Washington in character, of Hamilton in sagacity, who had the courage to maintain the Union even on the stricken field. State Sovereignty surrendered at Appomattox, and by the Fourteenth Amendment the people wrote into the Constitution that "*all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside*", thus forever destroying the doctrine that the citizen owed allegiance to his State only.

Ten states had now given their assent to the new government, but New York still held aloof. Geographically, commercially, and militarily it was of the utmost importance. Its territory extended from the Atlantic

Ocean to Canada, while the Great Lakes afforded it a boundless waterway to the west. Without New York the Union would be cut into halves and its success greatly imperiled. The other States fully sensed the danger of such deflection, and everywhere it was openly declared that if New York "refused to come into the Union it would be conquered and dragged in." That it would come in peaceably seemed highly improbable, for in no State was popular hatred of the Constitution so pronounced. Throughout the State it was universally denounced as a "triple-headed monster" and "as deep and wicked a conspiracy as was ever invented in the darkest ages against the liberties of a free people."

The cause of this opposition was that the State had the main commercial port and largest custom house in America, which was its chief source of revenue. It was generally hoped and expected that with the development of the country and the growth of population, the public income from this source would completely relieve the people of all taxation. Should the State enter into the new government, such revenue would pass to the National Organization. Nevertheless, there were numerous able and ardent supporters of the Constitution in every section of the State who kept up a constant agitation in its behalf. Clashes between the opposing factions, which sometimes assumed the proportion of riots, were not infrequent, the most serious occurring in Albany where considerable blood was shed.

The Legislature finally called a convention to meet at Poughkeepsie on June 17, 1778, to consider the Constitution. The Anti-Federalists had an overwhelming majority of the delegates. They were led by Governor George Clinton, who had been the State's Chief Execu-

tive for nine years, and looked upon the State as his political throne. Associated with him were Yates and Lansing, New York's two irreconcilable delegates in the Philadelphia Convention, and Melancthon Smith, one of the ablest debaters in America. The Federalist position was defended by Hamilton, Jay, and Livingston, but the chief burden fell upon Hamilton. He had also been a delegate to the Philadelphia Convention. His work there, however, had not been commensurate with his ability. Public sentiment in his State did not support him, and his two weaker colleagues carried the vote of his State against him on every important point. It was in the struggle over the adoption of the Constitution, and especially in the New York Convention, that Hamilton displayed his incomparable genius. With supreme tact and patience, and with an eloquence never surpassed in America, he argued for the greater part of five weeks, rehearsing many of his arguments used in *The Federalist*, and answering new assaults. At last, Melancthon Smith deserted the Clinton faction and announced his support of the Constitution. With the aid of this new and powerful ally, Hamilton soon won a majority to his side. Faced by defeat, Lansing, of the Clinton faction, introduced a resolution for conditional ratification, reserving to the State the right to secede after a certain number of years, unless the amendments proposed should previously be submitted to a general convention. Hamilton dispatched a messenger to Madison, who was attending Congress in New York, to inquire whether "a State Convention had the right to ratify with such a condition." Madison replied that the Constitution did not contemplate its own overthrow, and that "such a ratification would not make New York a member of the Union." Hamilton so advised the Con-



vention, and further stated that a State having once accepted the Constitution, it was within the Union forever. He then played his last trump card by warning the "up-state" delegates that if they refused to accept the Constitution, Manhattan Island, Westchester and Kings Counties would secede from the rest of the State, form a State by themselves, accept the Constitution, and thus leave them without a seaport. If anything was lacking, this threat completed the overthrow of the Clinton party, and on July 26, 1788, the Constitution was ratified by a vote of 30 to 27.

On August 4, 1788, a convention in North Carolina rejected the Constitution by a vote of 193 to 75, while Rhode Island was too indifferent even to call a convention to consider it. The people of the City of Providence, however, favored the Constitution and, on July 4, 1788, were preparing to celebrate its ratification by the requisite number of States, when an armed mob of a thousand men, headed by a Judge of the Supreme Court, came in from the country, broke up the celebration, and publicly burned a copy of the Constitution. Several months after the inauguration of Washington as President, these recalcitrant commonwealths were firmly told that unless they entered the Union, they must pay their share of the war debt, and, if necessary, force would be used to collect it. In addition, the Federal Government began to treat them as foreign countries and subjected them to a tariff on all their exports to other States. Unable to withstand such economic pressure, North Carolina called a second convention which accepted the Constitution on November 21, 1789, by a vote of 189 to 86. Rhode Island followed on May 29, 1790, likewise ratifying it by a vote of 34 to 32, and the *Union of the original thirteen States was complete.*

## CHAPTER VI

### DIFFICULTIES OF THE NEW GOVERNMENT

*Whatever measures have a tendency to dissolve the Union or contribute to violate or lessen the sovereign authority, ought to be considered as hostile to the liberty and independence of America, and the authors of them treated accordingly.*

GEORGE WASHINGTON.

THE struggle over the adoption of the Constitution had been a contest between the traditions of the past and the inexorable economic demands of the future, with the victory to the latter. On July 2, 1788, Congress was officially notified that the ninth State had ratified the Constitution. By a Resolution passed on September 13, following, that body declared the Constitution in effect and fixed the first Wednesday in January, 1789, for the choice of electors, the first Wednesday in February for balloting for a President and a Vice-President, and the first Wednesday in March (which fell on the 4th) for the commencement of the new government. Only ten States participated in that first election. North Carolina and Rhode Island had refused to accept the new order, and, of course, held no election. New York had ratified the Constitution, but public resentment was so strong against it throughout the State, that its legislature refused either to call an election or to appoint electors; hence, it likewise had no part in the election of Washington as the first President of the Republic.

The new Congress was called to convene in New York on March 4, 1789, but a quorum did not assemble until

March 30. On April 6, John Langdon, a Senator from New Hampshire and also a signer of the Constitution, was elected for the sole purpose of opening and counting the votes for President of the United States. Washington was the unanimous choice for President, while John Adams was chosen Vice-President. Messengers were dispatched at once to advise each of his election. Adams was the first to arrive in New York, and was inaugurated on April 21. On April 16, Washington made the following notation in his diary: "About ten o'clock I bade adieu to Mount Vernon, to private life, and to domestic felicity; and with a mind oppressed with more anxious and painful sensations than I have words to express, set out for New York, with the best disposition to render service to my country, in obedience to its call."

Washington's reception in New York was such as to fill his mind with "sensations as painful as they were pleasing." He was inaugurated April 30, 1789, but did not name his Cabinet until September. With characteristic firmness, he personally began the organization of the various departments of the new government. No later President has had to face such a task as confronted Washington, and none has met the problems incident to that great office with a higher degree of courage and statesmanship.

At the time Washington assumed the Presidency the country was still suffering from the exhaustion caused by the Revolution, and from the effects of the weakness of the late Confederation. The future looked dark and uncertain. Every State had some quarrel with its neighbor, and the country was on the verge of anarchy. Commerce languished, public credit was dead, business

was paralyzed. In fact, it seemed that the American experiment in popular government had come to a disastrous end.

It is true that, as President, Washington had the Constitution as a guide, but that instrument, in the beginning, was nothing more than a skeleton, a promise, and a hope. Into it had to be breathed life and force. Out of nothing the whole machinery of a government had to be called speedily into existence, departments organized, and provision made for the pressing needs of the new and indigent government. There was no treasury, no mint, no revenue, but there were clamoring creditors by thousands, and a debt amounting to the staggering sum of eighty millions of dollars, which necessitated either repudiation or provision for its future payment.

For his Secretary of the Treasury, Washington naturally turned to Robert Morris, the "Financier of the Revolution," who declined, and suggested the youthful, brilliant, and profoundly intellectual genius, Alexander Hamilton. At this time Hamilton was only thirty-two years of age, but he was a national figure. As a youthful prodigy he had flashed like a meteor across the lurid skies of the Revolution, and his ability had deeply impressed Washington. He had been a member of the old Congress, had sat in the Convention that framed the Constitution, and had done more to secure its adoption than any other individual. In appearance he was small of stature, but strikingly handsome. In disposition he was courageous, open, frank, egotistic, dominating, and imperious. He could not conciliate, and would brook no opposition to his plans. For bravery in battle, he had been called the "Little Lion" by his comrades.

Hamilton was not only familiar with the financial schemes of every country, but likewise knew the science of government as no other man in America then did. Of him it has been said that "he could do the thinking of his time, map out a policy, and arrange the details for a kingdom." Fully conscious of his own powers, he was envious of no man. He saw things clearly at a glance, and was ready to act. If others would not follow, he had the courage to push on alone. In politics he was a *loose constructionist*; that is, he believed in such a liberal construction of the Constitution as would make the National Government both strong and efficient. He was the undisputed leader of the Federalist party, which accepted his constitutional views as the chief tenets of its political faith. He regarded his office as that of a Prime Minister, and proceeded thoroughly to organize the various departments of the new government. As a financier, he has certainly had no equal in our history. Of him Daniel Webster said that "he touched the corpse of public credit and it immediately sprang upon its feet." He converted the huge debts of the poverty stricken Nation into assets, and by his mighty achievements made possible the triumphant success of the Republic.

When Hamilton assumed office many leading American statesmen argued that the Nation could never live under its weight of debt, and freely and frankly advocated repudiation. To all such arguments Hamilton replied that there should be no repudiation, and that every creditor should be paid in full. "In no other way", said he, "can the people be made to feel an absolute security in their government"—a dictum in finance which no later statesman has dared to question.

Hamilton's financial plan embraced five distinct objects: (1) the creation of a national currency and placing the public debt on a sound basis by the collection of a tariff on importations, a tonnage tax on shipping, and an excise tax on whiskey; (2) the assumption by the National Government of all State debts contracted in the interest of the Revolution; (3) refunding the foreign and domestic debt by issuing bonds, dollar for dollar; (4) establishing a mint for the coinage of a uniform metallic currency; (5) as an aid to the foregoing, the creation of a National Bank.

The Anti-Federalist party, which was the organized opposition to the Constitution, ceased to exist with the formation of the new government. The enemies of the new order, however, while temporarily discouraged, were still numerous and powerful. In common with most of the founders of the Republic, Washington looked upon political parties and their antagonism as inimical to the public weal, and deplored their organization. With the view, therefore, of pacifying the powerful Anti-Federalist sentiment, he selected Thomas Jefferson as his Secretary of State. Jefferson was Hamilton's senior by fourteen years. He had achieved distinction in the Continental Congress as the brilliant author of the Declaration of Independence, as Governor of Virginia, and as Minister to France. In appearance, he was large of stature; in disposition, timid, reticent, arrogant, suspicious and jealous. He believed, or pretended to believe, that Hamilton contemplated the overthrow of the Republic and the establishment of a monarchy. He was a strong believer in "State Sovereignty", and distrusted the Constitution as an instrument designed to reduce the States to a position inferior to that of the

National Government. He was also a *strict constructionist*—that is, nothing was constitutional in his view unless it was clearly written in the fundamental law. He vigorously argued that the last paragraph of Section 8, Article I, of the Constitution, (the *Necessary and Proper Clause*), which grants to Congress the power “to make all laws which are necessary and proper for carrying into execution” the powers granted, neither conferred a new power on that body, nor enlarged those specifically granted beyond what was “absolutely necessary” to the execution of express powers; and, therefore, that no implied powers were conferred upon Congress by the Constitution.

Aside from later judicial interpretation, nothing is more certain today than that Jefferson erred in his construction of this clause of the Constitution. This clause was studiously inserted in that instrument to obviate the destructive restriction in the old Articles of Confederation that each State should retain the powers “not by this Confederation *expressly* delegated to the United States in Congress assembled”, and not a voice was raised in the Constitutional Convention against its inclusion. In fact, it is this clause that gives to the Constitution that flexibility which makes it adaptable to conditions that were undreamed of at the time it was written, and serviceable for all time—“endows it with the power of endless life.” Because of it Congress has had the power, under the “Commerce Clause”, to enact legislation regulating steamboat navigation, railroad and airplane transportation, telephone, telegraph, and radio communication, and many other things which were beyond the dreams of men when the Constitution was written.

When Jefferson arrived from France to take up his duties as Secretary of State, Hamilton had been already at work for six months, and he was everywhere recognized as the master mind who was redeeming the Nation from financial chaos. Whether prompted by jealousy or not, Jefferson deeply resented the growing popularity and increasing power of his younger colleague, and especially his influence over Washington. Moreover, the political views of these men were too much at variance to enable them to be companionable. As has been said, "the ideal of Hamilton was the hive, the ideal of Jefferson was the bee." To the former, the Union was everything; to the latter, the States were more important than the Union. Between two men of such strong but utterly dissimilar personalities, and such widely divergent political views, there could be nothing but violent and eternal opposition. Jefferson bitterly opposed Hamilton's plans for stabilizing the finances of the government and, as a result, there soon developed between them a bitter personal and political feud, the echoes from which may still be heard in American political life. To oppose Hamilton and the administration of which he was then a part, Jefferson organized and headed the Republican party (now the Democratic party). Through all the turmoil Washington maintained a supreme calm—always an evidence of strength. Jefferson resigned soon afterward.

In the meantime Madison deserted the Federalist party and aligned himself with Jefferson and James Monroe in the newly organized Republican party. Jefferson, it will be remembered, had written from Paris that he both favored, and was opposed to, the Constitution, while Monroe was one of the leaders against its



ratification in the Virginia Convention. This "Virginia Triumvirate" soon gathered around itself the remnants of the old Anti-Federalist party and began a bitter war on Hamilton personally, as well as on his financial policies. Their wrath was particularly directed against the Assumption Act and the National Bank charter as "unconstitutional encroachments upon the rights of the States." "The Constitution", they said, "contains no express provision authorizing Congress to charter banks or corporations", and such measures were therefore not only unconstitutional, but "foretokened the loss of powers by the States and an increase of central strength." The Federalists, however, were in control of both branches of Congress and Hamilton's proposals were speedily enacted into law. Jefferson filed with Washington a lengthy brief, prepared by Madison, urging the veto of the Bank charter because of its unconstitutionality. At the President's request, Hamilton prepared an answer in which he raised, for the first time, the doctrine of *implied powers* under the *Necessary and Proper Clause* of the Constitution. Hamilton argued that the Constitution was merely an outline and, to determine its true powers, it was necessary to look to its intention, for it possessed all the powers *implied* in that intention. "If nothing could be done except what was expressly stated therein", he further argued, "then the Constitution could never serve this rapidly developing Nation, but remain a lifeless legal document. The proposed Bank", said he, "is a proper instrument for carrying on the Nation's business, but not an absolutely necessary one." This answer convinced Washington of the soundness of the measure, and he approved it. It must have convinced Madison also, for, as President twenty-five years

later, he approved the second National Bank charter, and even Monroe praised the revival of this despised measure of Hamilton as lavishly as he had previously condemned it.

In 1818, when the constitutionality of the Bank charter was before the Supreme Court in *McCulloch v. Maryland*, 4 Wheaton, 316, Chief Justice Marshall not only admitted that he could add nothing to Hamilton's argument, but also wrote into our judicial history the views of the latter as to the existence of *implied powers* in the Constitution. "There is no phrase in the Constitution", said Marshall, "which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. \* \* \* A Constitution to contain an accurate detail of all the subdivisions of which its great powers will admit and all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public."

This doctrine of *implied powers* or broad construction of the Constitution, under the *Necessary and Proper Clause*, so ardently championed by Hamilton and so bitterly denounced by Jefferson, chief exponent of the *strict or narrow construction* theory, became the distinct line of cleavage between the two great schools of political thought and action, and was the storm center around which beat the tempest of State Sovereignty with an ever increasing fury "until its thunders were the roar of cannon; its lightnings the flash of battle." In fact, as said by James Bryce in his *American Commonwealth*, "the history of the United States is in a large

measure a history of the arguments which sought to enlarge or restrict its import."

The States Rights advocates, however, soon had far greater cause for alarm. The Constitution does not specifically empower the Supreme Court to determine whether State statutes are in conflict with that supreme law. But Hamilton and the Federalists maintained that since Article VI, of the Constitution made it, and all Federal laws enacted and treaties made in pursuance thereof, the supreme law of the land, and bound the judges of every State thereby, such authority was an *implied power* in the Constitution, for in no other way could the Nation protect itself against State encroachment. In accordance with this view, the First Congress passed the Federal Judiciary Act, the 25th Section of which conferred upon the Court the full authority to determine the constitutionality of State laws. While the Federalists regarded this section as the keystone of the arch supporting the whole plan to escape the weakness of the old Confederation, the States Rights adherents denounced it as an instrument of oppression which destroyed the last vestige of State authority. This Section, except for a few minor changes, is still the law and is probably the most important and satisfactory Act ever passed by Congress. Nevertheless, it was a decided impairment of the sovereignty of the States, and, for that reason, it became one of the two main grounds for the bitter fight which was waged against the Supreme Court for more than fifty years. The second cause, a corollary of the first, was the *implied powers* vested in the Supreme Court to pass on the constitutionality of Acts of Congress, which is discussed at length in Chapter XIII.

The fight waged by the States Rights advocates against this 25th Section of the Judiciary Act continued down through the years with an ever-increasing bitterness. To check what they styled the "constantly increasing interference of Federal with State authorities", a bill was reported favorably by the Judiciary Committee of the House in 1831 for its repeal. The bill was defeated after a bitter fight, but it received practically the unanimous support of the Representatives of the Southern and Western States. If such bill had passed, beyond all doubt, nullification, anarchy and convulsion would have ensued, and the Union would have been done to death by legislative fiat. The Constitution would have then become a dead letter, and the labors of truly great men for an "indissoluble Union composed of indestructible States" would have been in vain. If such proposed law were in effect today, it would be possible to have forty-nine different constructions of any Act of Congress and an equal number of interpretations placed on any clause of the Constitution—a different one by each of the forty-eight States and still another by the Federal Courts. Under the wide provision of this much abused 25th Section, it has been possible to secure that uniformity of judicial construction that has made possible the great economic, industrial, commercial, and social development that has characterized our Nation. In other words, through the judicial exercise of this power we have developed into a Nation rather than into a confederacy.

Washington served two terms, which were characterized by much constructive legislation and broad statesmanship. In September, before his retirement in March, he issued his justly famous "Farewell Address

to the American People", which was prepared by Hamilton, and which ranks with our greatest State papers. Among other things, he said: "Be Americans. Let there be no sectionalism, no North, South, East, or West; you are dependent one on another, and should be one in union. \* \* \* Keep the departments of government separate, promote education, cherish the public credit, avoid debt. Observe justice and good faith toward all nations; have neither passionate hatreds nor passionate attachments to any; and be independent politically of all. In one word, be a Nation; be Americans, and be true to yourselves."

Washington's administration was succeeded by that of John Adams, Federalist. In the spring of 1798 war with France seemed imminent. Against the advice of Hamilton, Congress, in July, enacted the Alien Law and the Sedition Law. Under the former the President was authorized to banish any alien, without accusation or trial; while the latter made it a high misdemeanor, punishable by fine and imprisonment, for any person to print or publish "any false, scandalous, and malicious writings against the government of the United States, or either House of Congress, or the President, with intent to defame them, or to bring them into contempt or disrepute." The passage of these laws was a blot on our constitutional right of freedom of speech, and the liberty of the press. Party feeling, however, was running at high tide, and it was not long before there were numerous arrests and prosecutions under the Sedition Law. The first to feel its weight was Col. Matthew Lyon, a member of Congress from Vermont, who was convicted for a libel on President Adams, sentenced to four months in jail and fined \$1,000. His friends

prepared a petition for his pardon, but he refused to sign it, and, consequently, the President refused to grant it. He was, however, triumphantly re-elected to Congress while in jail. In all such prosecutions the defense was made that the law violated the *freedom of speech* and the *liberty of the press* clauses of the Constitution. Its constitutionality, however, was upheld by the Circuit Courts, which further incensed the Republicans against the Federal Judiciary.

Another position assumed by Jefferson and the early States Rights advocates was, that a State, being sovereign, possessed the right to determine for itself the constitutionality of any Act of Congress. Chief Justice McKean, of Pennsylvania, an ultra States Rights adherent, in an opinion appended to *State v. Cobbet*, 3 Dallas 467, decided in 1798, judicially stated their position with frankness and clarity. "The Constitution," said he, "is a league or treaty made by the individual States, as one party, and all the other States as the other party." If "any collision occur, it cannot be remedied by the sole act of Congress or of a State \* \* \* there is no common umpire but the people, who should adjust the affair by making amendments (to the Constitution) \* \* \* . There is no provision in the Constitution that in such cases, the Judges of the Supreme Court of the United States shall control and be conclusive; neither can Congress by law confer that power."

This was the first official declaration of the doctrine of *Nullification*, or the right of a State to remain in the Union and still refuse to be bound by an Act of Congress. But, in November, 1798, Jefferson, while Vice-President, prepared and sent to Kentucky the cele-

brated "Kentucky Resolutions", which were immediately passed by the legislature of that State. These resolutions declared the Sedition Law unconstitutional and in no wise binding upon that State. Invitations were sent to all the other States to join with Kentucky, not only in holding this law void, but also in declaring that no "other Act of Congress not plainly authorized by the Constitution shall be exercised within their respective jurisdictions." All replies received were antagonistic to the resolutions. At the instance of Jefferson, Madison prepared similar resolutions which were passed by the Virginia Legislature thirty days later, but they were likewise condemned by the other States. These were the first open attempts at *Nullification*, which owes its origin to Thomas Jefferson. It was these Kentucky and Virginia Resolutions, however, that made the platform which carried Jefferson into the Presidency two years later.

New England was next to raise the doctrine of *Nullification*. That section bitterly opposed the War of 1812 as ruinous to its commercial interests. In October 1814 a convention of delegates from Massachusetts, Connecticut and Rhode Island met at Hartford and adopted resolutions strikingly similar to those which Jefferson sent to Kentucky sixteen years earlier. Among other things, these resolutions declared that Acts of Congress which violate the Constitution are void, and in periods of emergency the States must be their own judges. Happily for the country, the war soon ended and the convention was forgotten. The resolutions, however, were vigorously condemned, especially in the Southern States.

This *Nullification* sentiment, however, continued to

grow. The next section to yield to its baneful influence were these same Southern States which had so vigorously condemned the Hartford Convention. This was due largely to an increasing national sentiment for a protective tariff—a policy which was then favored by the Democratic party. In 1828 a tariff bill was passed which South Carolina denounced as the “Tariff of Abominations”, and throughout the State *Nullification* of the law was freely advocated. It was this alleged right of a State to nullify an Act of Congress that furnished the subject matter of the famous debate in the United States Senate in 1830 between Webster and Hayne, in which Webster proclaimed the great constitutional doctrine that the Constitution is not a “league between the States”, but a solemn covenant among the people; and that no State can dissolve its relations with the Federal Government. On April 13, 1832, an incident occurred which clearly demonstrated to the country where President Andrew Jackson stood on this vexatious question. A dinner was given in Washington on the birthday of Jefferson, the deceased founder of the Democratic party, whose death had occurred five years before. The President attended. Calhoun was toastmaster. The toasts and speeches all advocated *Nullification*. Toward the end of the speechmaking, the tall, gaunt form of “Old Hickory” rose to its full height. He looked Calhoun squarely in the eyes, raised his glass, and, in tones that cracked like a whiplash, said: “*Our Federal Union! It must and shall be preserved.*” He had said enough. The country knew where Andrew Jackson stood.

Notwithstanding this warning from the President, on November 24, following, South Carolina undertook to



give practical effect to this doctrine by passing its famous "Nullification Ordinance", in which it proclaimed the tariff law unconstitutional, and further declared that any attempt by the Federal Government either to enforce it, or to coerce the State, would be met by armed resistance. When notified of the passage of the Ordinance, stern old Andrew Jackson said: "If a single drop of blood shall be shed there in opposition to the laws of the United States, I will hang the first man I can lay my hands on engaged in such conduct, upon the first tree that I can reach." He promptly issued his famous "*Nullification Proclamation*", and prepared to use the army and navy to sustain the Federal authority. Confronted by such resistance, the nullifiers — Calhoun and Hayne—yielded to Federal authority, but the Civil War was not far distant. In reviewing this incident, one cannot but speculate as to what would have been the turn of events if Andrew Jackson had been President from 1857 to 1861 instead of the weak, indecisive, vacillating James Buchanan.

It must not be understood, however, that *Nullification* was exclusively a Southern doctrine. The truth is, that prior to the Civil War, it was advocated vigorously by every section of the Union whenever it was to the interest of such section so to do. In addition to having participated in the Hartford Convention in 1814, Massachusetts declared that the admission of Texas in 1845 was not binding upon it as a sovereign State. Enraged over the enforcement of the Fugitive Slave Law within its borders by the Federal Courts, (*Ableman v. Booth*, 21 Howard 506), Wisconsin's Legislature solemnly resolved that as a sovereign State it had the right to determine its own status in the Union. Likewise,

when the same law was before the Supreme Court and Chief Justice Taney declared that tribunal to be the final constitutional arbiter for deciding "The angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force", the leader of Ohio's delegation in Congress asserted that if the founding fathers had anticipated that the rights of the States were to be thus invaded, the Federal Union would have been impossible.

Public sentiment was extremely bitter against both the Alien and Sedition Laws, and Jefferson, being an astute politician, was quick to take advantage of what he styled "but another example of Federalist tyranny." Because of the unpopularity of these laws and the ill will which existed between President Adams and Hamilton, the Federalist Party was not a serious factor in the election of 1800. Jefferson and Burr, both Republicans, tied for the Presidency—each receiving seventy-three electoral votes. This threw the choice of a President into the Federalist House of Representatives. Not because he loved Jefferson more, but because he loved Burr less, Hamilton threw his powerful influence to Jefferson, who was chosen by a majority of one, the deciding vote being cast by Col. Matthew Lyon who had served four months in jail for a libel on President Adams. For this service to his former antagonist in Washington's Cabinet, Hamilton paid with his life in a duel with Burr. Thus deprived of its great leader, the Federalist party soon ceased to exist and was succeeded by the Whig party.

One of Jefferson's first official acts upon assuming office in 1801 was to order the release of all persons in prison or under prosecution for violation of the Sedition

Law, declaring such law to be "a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image."

Jefferson came to the Presidency amid a great fanfare against the doctrine of *implied powers* in the Constitution. Two years later (1803), however, he exercised such *implied powers* further and for a greater purpose than any President in our history. He found no express provision in the Constitution authorizing the purchase of territory on behalf of the Nation. But when confronted with the possibility of acquiring the vast Louisiana Territory from France, he stated that he "was willing to sacrifice a constitutional principle in the face of a great necessity." Under a proper construction of the Constitution, he made no such sacrifice. The *implied powers* granted in that instrument were amply sufficient to authorize such purchase. In fact, its very first clause authorized Congress to "*provide for the common defense*" and to "*promote the general welfare*" of the people of the United States—exactly what such purchase, which gave us control of the Mississippi, did for the people of the United States. Twenty-five years later, (1828), in *American Insurance Co. v. Canter*, 1 Peters 511, an appeal from the Territorial Court of Florida, Chief Justice Marshall clearly stated the power of the government to enlarge the national domain. "The Constitution", said he, "confers absolutely on the government of the Union the power of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."

Notwithstanding the complete reversal of political control in the election of 1800, which gave the States

Rights party the Presidency and the control of both Houses of Congress, the Supreme Court remained wholly Federalist. John Marshall, who had so ably defended the Constitution in the Virginia Convention, was appointed Chief Justice by President Adams only six weeks before Jefferson's inauguration. It was not long before the important question of *implied powers* under the *Necessary and Proper Clause* of the Constitution, which meant life or death for the Union, was before that tribunal. In 1805, in *United States v. Fisher*, 2 Cranch 358, the Court, for the first time, clearly indicated that it held views on this far-reaching doctrine similar to those previously enounced by Hamilton and, in a long line of later decisions, the Supreme Court has irrevocably written the constitutional interpretation of the "Little Lion" into the judicial and political fabric of the Nation.

Jefferson and his States Rights followers, however, did not immediately give up the fight. Wholly ignoring the constitutional provision that the Federal Judiciary was a co-ordinate branch of the government, equal in dignity either to the Executive or the Legislative branch, they began a systematic attempt either to bend the Supreme Court to the Congressional will or to change its political complexion by the impeachment and removal of the Judges. In 1805 Justice Chase was impeached. The Senate, as the trial court, adopted the extraordinary theory that impeachment was not a criminal proceeding, but only a method of removal, and is "*simply a means of keeping the Court in harmony with the Congressional will.*" Chase was acquitted, but for years the bitter fight against the Court continued in Congress, the sole object of which was to compel the Court to ac-

cept the conclusions reached by that body. Despite the constant abuse which was heaped upon it, that great tribunal maintained its fine dignity and independence in the face of powerful opposition and continued its defense of the Union.

It is a striking incident in our history that, after 1811, a majority of the Court owed their appointment to the States Rights party, and the appointees had long been the ardent advocates of that doctrine. Upon taking office and being charged with the tremendous responsibilities of their high station, however, most of them became as ardent in their Nationalism as was Marshall himself. For this they were more soundly abused than he, and suffered the fate that has always been meted out to apostates—ostracism by their party. It was also after this date (1811) that Marshall rendered his great opinions in *McCulloch v. Maryland*, *Cohens v. Virginia*, and *Gibbons v. Ogden*, in which the power of the Court to hold a State statute unconstitutional was permanently established.

The pronounced insistence upon a *strict or narrow construction* of the Constitution, as well as the bitterness displayed toward the Supreme Court, for the most part, emanated from the same influences which disapproved of a strong central government in the Philadelphia Convention, and later opposed the adoption of the Constitution. In addition to the fear of a strong central government, however, there was also present in the minds of the Southern States Rights leaders the fear that, should the doctrine of *implied powers* in the Constitution, and a broad construction of the "Necessary and Proper Clause" of that instrument, become controlling, it would some day be used to support Congressional legislation respecting slavery. History records

how well grounded were these fears. It was this fear for the future of slavery that induced Southern Representatives in Congress to oppose any Congressional appropriation for internal improvements—canals and post roads—matters which were clearly within the powers of the Federal Government under the *implied powers* in the Constitution. In such opposition, however, the Democratic leaders of that time, and to that extent, repudiated the principles of their great founder, Thomas Jefferson. In 1806, Jefferson recommended to Congress the proposal of an amendment to the Constitution to authorize the spending of surplus Federal funds in the States for education, and the construction of roads and canals. Nor may this jealousy of slavery be imputed to Jefferson. It is a matter of history that he favored the emancipation and deportation of all slaves. But happily for our country, the destruction of the slave institution has put an end to all sectional bitterness respecting constitutional interpretation on this subject.

In the study of history it is always interesting to note to what extent the personal element has changed the course of events. This is especially true of our early history, for much of the bitterness and misunderstanding of that period may be traced directly to the personal and political feud between Thomas Jefferson and Chief Justice John Marshall. They were cousins, being descended from a common ancestry—Col. William Randolph and Mary Isham, his wife, a distinguished Virginia family. Notwithstanding this blood relationship there existed between them a malignant personal and political hatred, which at times, threatened the tranquility of their country.

Marshall opposed the election of Jefferson as President because he sincerely believed him to be an unscrupulous demagogue and an advocate of principles antagonistic to sound government. He also blamed Jefferson for much of the popular hostility toward the Court. Conscious of the dignity of his high office, however, he never publicly uttered an unkind word concerning his illustrious kinsman. "Even when his great antagonist died", says one historian, "no expression of sorrow or esteem or respect or admiration came from the Chief Justice. Marshall could not be either hypocritical or vindictive, but he could be silent."

On the other hand, Jefferson, with equal sincerity, doubted the motives and patriotism of Marshall. He was convinced that the Chief Justice was striving to destroy the States and to subordinate both the Executive and Legislative branches of the Government to the Judicial. His animus toward Marshall continued even after he left the White House. In a letter to President Madison, written in 1810, he referred to "the rancorous hatred which Marshall bears to the Government of his country", and to the "cunning and sophistry within which he is able to enshroud himself"; and to John Tyler he wrote, that in the hands of Marshall "the law is nothing more than an ambiguous text, to be explained by his sophistry into a meaning that may subserve his personal malice." In fact, it may be said that, for twenty-five years, the history of the United States may be chronicled in the story of the conflict for supremacy between these illustrious kinsmen. Time, however, has witnessed the triumph of the views of Marshall as to the necessity for a strong central government and a liberal interpretation of the Constitution.

The lapse of time has also clearly demonstrated that each was mistaken in his estimate of the other. Both were intensely patriotic, and each, in his respective sphere, contributed much to his country. Marshall was, beyond doubt, the ablest Chief Justice who has ever filled that exalted station. With no precedent to guide him, he blazed the trail for constitutional government and ordered liberty, and, by his vision and courage, made us a virile Nation rather than a feeble federation of weak and jealous States. Aside from his views on a strict or narrow construction of the Constitution, Jefferson probably gave to the world more broad principles of government than any other man. His name should always be spoken with reverence and respect by all who cherish liberty and a republican form of government. The only probable explanation for their mutual distrust is, that Jefferson, not being a profound lawyer, was unable to comprehend the ultimate effect of Marshall's judicial conclusions; and Marshall, being an ultra-conservative, was likewise unable to appreciate Jefferson's efforts to improve the condition of the common man.



## CHAPTER VII

### AMENDMENTS TO THE CONSTITUTION

*The basis of our political system is the right of the people to make or alter their constitution of government.*

GEORGE WASHINGTON.

OURS is the first government in the history of the world to provide for its own change without revolution. As stated by Washington in his letter to the people of Massachusetts, while their constitutional convention was in session, "if the Constitution is imperfect, a way is provided for its amendment without tumult or disorder." Article V, of that instrument provides two methods by which it may be amended. First, by a vote of two-thirds of both Houses, Congress may propose an amendment, and if the same be ratified by the legislatures of three-fourths of the States or by conventions of three-fourths thereof, as Congress may propose, the same shall become a part of our fundamental law. The term "two-thirds" as here used means two-thirds of the members present, and not two-thirds of the entire membership. Second, on application of the legislatures of two-thirds of the States, Congress "*shall call a convention for proposing amendments,*" and when ratified by the legislatures of three-fourths of the States, or by conventions in three-fourths thereof, as Congress may direct, such proposed amendments shall become a valid part of the Constitution. So far, all amendments to our Constitution have been proposed by Congress and ratified by State legislatures. There is no constitutional provision for submitting a proposed amendment to a vote of the people for approval or disapproval.

In the New York constitutional convention both Hamilton and Madison held that a State had no constitutional power to ratify the Constitution and rescind its action later if dissatisfied; that when a State once ratified it, it was in the Union forever. This has since become the established rule of our Government. Without avail did South Carolina attempt, in 1860, to withdraw its ratification of 1788. The same is true respecting amendments; having once ratified an amendment, no State has the authority to rescind its approval. Without avail New Jersey, Oregon, and Ohio attempted to rescind their affirmative action respecting the Fourteenth Amendment, while New York attempted the same course in regard to the Fifteenth.

Only nineteen amendments have been added to our Constitution since the formation of our Government. The first ten were adopted at one time. Hence, the instrument, in truth, has been amended only ten times. It must not be understood, however, that no other amendments have been proposed by Congress, for it is estimated that no fewer than three thousand amendments have been so proposed. Nine have passed the Senate and failed in the House, while an equal number have passed the House and failed in the Senate.

It is a mistake, however, for Congress to submit an amendment to the Constitution to the people for ratification without at the same time fixing a time limit for its acceptance or rejection. Because of this oversight there are now five proposed amendments pending before the States which may be ratified and become a part of the Constitution at any future time. Two of these proposed amendments were submitted by Congress in 1789 along with the first ten Amendments adopted. One

fixed the compensation of members of Congress, while the other concerned the apportionment of representation in the House of Representatives. They were both rejected by the States. The third proposed amendment was submitted in 1810, and would have deprived any person of his citizenship who accepted any "present, office, or emolument from any emperor, king, prince, or foreign power." It was ratified by twelve States and needed the approval of but one more State to make it effective. The fourth proposed amendment was submitted by Congress in 1861, and its adoption would have prevented any future amendment to the Constitution which would have abolished or otherwise interfered with the institution of slavery. It was ratified by three States. The fifth of such proposed amendments was submitted in 1924, and was known as the "Child Labor Amendment". It would have given to Congress the power to regulate the labor of all persons under the age of eighteen years. This proposed amendment has been rejected by thirteen States. No time limit having been fixed by Congress for the ratification or rejection of any of these amendments, they are still pending before the States, and may yet be ratified and become a part of our fundamental law. Such a possibility, however, is very remote.

#### THE FIRST TEN AMENDMENTS

The first Ten Amendments to the Constitution were adopted as a result of the suggestions of the various State constitutional conventions. The Massachusetts convention had suggested nine amendments; New Hampshire, twelve; South Carolina, four; New York, thirty-two; Virginia, twenty; the first convention in

North Carolina, twenty-six; Pennsylvania, minority, fourteen; Maryland, minority, twenty-eight. It was the purpose of Patrick Henry and Governor Clinton to force another general convention to consider these numerous proposed amendments. In that way they hoped to reconstruct the entire Constitution so as to vest fewer powers in the National Government and more in the States. Foreseeing the danger in reopening the whole question, Hamilton and Madison defeated this scheme and the opponents of the Constitution had to content themselves with having their amendments proposed by the First Congress and approved by the legislatures of the several States, as provided in the Constitution itself.

Though the enemies of the Constitution were temporarily discouraged by its adoption, they continued to be numerous, powerful, and bitterly hostile to the new Government. Then, further to quiet this opposition, Madison laid before the first session of the First Congress all of the amendments suggested by the various States. Quite naturally several of the amendments proposed were practically, or entirely, duplicates, accordingly the House reduced the whole to seventeen. The Senate further reduced them to twelve, which were submitted to the States. Two were rejected, ten were approved by the necessary three-fourths of the States and declared in force December 15, 1791. It will be noted that the First Amendment begins thus: "*Congress shall make no law*", etc. Hence, such Amendments are limitations upon the powers of Congress only, and are in no wise binding upon the States. The first eight are known as our National Bill of Rights, and, in substance, guarantee freedom of religion, of speech, and of the press; the right of petition; the private right to bear

arms; immunity from arbitrary arrest and unreasonable searches and seizures; protection against quartering soldiers in private houses, and the taking of private property for public use without just compensation. The right of trial by jury was more clearly defined, and excessive bail, excessive fines, and the imposition of cruel and unusual punishments were forbidden. Then, further to quiet oppositional sentiment, the Tenth Amendment reserved to the States "*or to the people*" all powers neither delegated to the United States nor prohibited to the States by the Constitution.

The adoption of these amendments, to a large extent, made the Constitution its own expounder, and served the temporary purpose of satisfying its opponents. But the judicial records of the country show that the government which the framers of the Constitution designed would have progressed just as it has progressed if these amendments had not been adopted.

### XI AMENDMENT

The circumstances which led to the adoption of the Eleventh Amendment furnished one of the most interesting incidents in our history. During the struggle over the adoption of the Constitution one of the chief objections raised by the Anti-Federalists was that relating to the probable power given to the Federal Judiciary to summon a State into court and adjudicate its rights and liabilities. The advocates of the Constitution, however, disclaimed the existence of any such authority, and its final acceptance was due largely to the successful quieting of such fears.

It is not difficult, therefore, to conjecture the alarm with which both the friends and the enemies of the Con-

stitution viewed one of the first suits entered in the Supreme Court of the United States, in 1791, *Vanstophorst v. Maryland*, which was a suit brought by a firm of Dutch bankers against a State. This was followed by *Oswald v. New York*, and *Chisholm v. Georgia*, likewise against States. The last named case came on for argument in August, 1792. The Court's jurisdiction was clear. Section 2, Article III, of the Constitution, expressly extended the Federal judicial power to controversies "*between a State and citizen of another State.*" Georgia, however, refused to appear further than to file a written remonstrance denying the jurisdiction of the Court to adjudicate its rights as a sovereign State. The Court very properly held that it had jurisdiction, upheld the right of a citizen of one State to maintain a suit against another State, rendered judgment for the plaintiff, and awarded a writ of inquiry of damages.

The entire country was violently agitated by the decision, and the legislatures of several of the States adopted resolutions urging upon Congress the necessity of submitting a constitutional amendment to prevent such suits in the future. Georgia's resentment, however, took a more drastic form. Its legislature passed an act declaring that any Federal marshal, or other person, who executed any process of the Court in the case should "*suffer death by being hanged without the benefit of clergy.*" In the meantime, the writ of inquiry was never executed. Congress passed a Resolution, which was introduced in that body two days after the *Vanstophorst Case* was filed in the Supreme Court, submitting the Eleventh Amendment to the Constitution, which provides that "*The judicial power of the*

*United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."* This Amendment was declared in force on January 8, 1798, and the first serious crisis in our history was soon forgotten.

## XII AMENDMENT

The circumstances which led to the submission of the Twelfth Amendment are likewise most interesting. The framers of the Constitution were neither familiar with, nor did they anticipate, government control by the political party system. Hence, they provided in Section 1, Article II, of the Constitution that Presidential electors should vote for two persons for President, and the one receiving the greatest number of votes should be elected President, while the one receiving the next greatest number of votes should be elected Vice-President. Thomas Jefferson, however, while still a member of Washington's Cabinet organized the Republican party in opposition to the administration and the Federalist party. In 1796 he was the candidate of his party for President against John Adams, candidate of the Federalist party. Adams was elected and Jefferson became the Vice-President. Thus the administration was divided between two bitterly hostile and antagonistic individuals and parties. To prevent such an anomaly in the future, the Twelfth Amendment was proposed at the first session of the Eighth Congress (1803), approved by the States, and declared in force September 25, 1804. In substance it requires the electors to vote separately for the candidates for President and Vice-President, and in each instance the candidate

receiving the highest number of votes is elected to the respective office for which he was a candidate. Thus the dominant political party elects both the President and the Vice-President.

### XIII AMENDMENT

The Thirteenth Amendment to the Constitution abolishes slavery "*within the United States, or any place subject to their jurisdiction.*" When the Constitution was written the whole slave system was not only unprofitable, but generally frowned upon by the leading statesmen of the South, and was gradually dying out. All the delegates in the Constitutional Convention, except those from South Carolina and Georgia, favored the inclusion of a clause prohibiting the future importation of slaves, but those States forced a compromise extending the traffic for twenty years. While the Convention was in session, the last Congress, under the old Articles of Confederation, passed an Act creating the Northwest Territory (now Ohio, Indiana, Illinois, Michigan and Wisconsin) which forever excluded slavery within its limits. The measure was supported by the delegates from all the Southern States.

In 1793, however, a thing occurred which soon changed the economic importance of slavery and the attitude of the South concerning it. Eli Whitney invented the cotton gin. No other invention in our history has so profoundly affected our whole social, commercial, and political life as this simple machine to remove the seeds from the cotton fiber. Slavery rose at once from an unprofitable and decadent institution to a profitable and vital one. The importation of slaves greatly increased, and was continued by "slave runners"



long after the time fixed by the Constitution for its cessation. The traffic was carried on by lawless and unscrupulous individuals in much the same manner as "rum running" is practiced on the high seas today, with the chances of success much greater. The cotton gin, the improvement in machinery for spinning and weaving cotton, and slave labor made cotton "King", and for sixty years it swayed an imperious scepter almost unchallenged in American political life.

The Thirteenth Amendment was adopted sixty-one years after the adoption of the Twelfth, and owes its origin to slavery. At the time it was proposed in Congress, February 1, 1865, the Nation was convulsed by the great Civil War, which resulted in the utter destruction of the troublesome institution of slavery. President Lincoln's Emancipation Proclamation of January 1, 1863, issued as a war measure, had theoretically freed the slaves, but that great reform was made an accomplished fact only when the Thirteenth Amendment was officially declared a part of our fundamental law on December 18, 1865.

#### XIV AMENDMENT

The Fourteenth Amendment also grew out of slavery and the Civil War. It embraces several objects: (1) it makes the negro a citizen of the United States and the State wherein he may reside; (2) it forbids States to enact any law which abridges the privileges or immunities of citizens of the United States; (3) it prevents the "*States from depriving any person of life, liberty, or property without due process of law*" — a repetition of the prohibition found in the Fifth Amendment which is there directed against the National power

only; (4) it provides for a reduction of the representation in Congress of any State which denies or abridges the right of a citizen to vote; (5) all persons who as officers had previously taken an oath to support the Constitution of the United States, and later engaged in rebellion against its authority were made ineligible to hold any office, civil or military, (Congress, however, may remove such disability by a two-thirds vote); and (6) all debts contracted by the States in rebellion, in the interest thereof, were made illegal and void. This Amendment was proposed by Congress June 16, 1866, and declared adopted July 21, 1868. It was rejected by Delaware, Maryland, Kentucky, Texas, North Carolina, South Carolina, and Georgia.

In the famous *Slaughterhouse Cases*, decided in 1873, the Supreme Court construed this Amendment for the first time. In 1869 the "carpet-bag" Legislature of Louisiana, under the influences of bribery and corruption, passed an act incorporating a slaughterhouse company and granted to it the exclusive privilege of conducting all slaughterhouse business in the City of New Orleans. The State Supreme Court upheld the act, and the cases were appealed to the Supreme Court of the United States on the grounds that the statute abridged the "*privileges or immunities*" of citizens of the United States, in violation of the Fourteenth Amendment.

The Court upheld the constitutionality of the statute and asserted that it was only the rights which owed their existence to the Constitution and laws of the United States that were protected by the Amendment; that the Amendment did not bring within the power of Congress or the jurisdiction of the Supreme Court "the entire domain of civil rights heretofore belonging exclusively to

the States." To hold otherwise, said the Court, would "constitute this Court a perpetual censor upon all legislation of the States on the civil rights of their own citizens."

Notwithstanding this decision was one of the most important ever rendered by the Court, it was at the time universally condemned. The radical Republicans denounced it as destructive of the Fourteenth Amendment, and the Democrats deplored it as giving judicial approval to State-created monopolies. Its wisdom, however, is now recognized by all parties and sections, for a contrary holding would have destroyed every dividing line between State and National authority and, for all practical purposes, the States would have ceased to exist as separate political entities.

Nor may it be said that this Amendment had the effect anticipated by its framers respecting the rights and privileges sought to be conferred upon the newly created Negro citizens. By virtue of the authority thought to have been conferred upon it by this Amendment, Congress, in 1871, passed what was known as the Ku Klux Act. Section two made it criminal for two or more persons to conspire, or to go in disguise upon the highway or upon the premises of another for the purpose of depriving any person of the equal protection of the laws and the "*privileges or immunities*" under the laws. In *United States v. Harris*, 106 U. S. 629, decided in 1883, the Supreme Court held the section invalid, and declared that none of the Amendments authorized Congress to legislate as to the acts of private persons.

The same year the Court also held the Civil Rights Act unconstitutional. This statute was passed by Con-

gress in 1875 and penalized any discrimination against the Negro by denying him full and equal enjoyment of the accommodation of hotels, public conveyances and places of public amusement. In four cases heard together and known as the "Civil Rights Cases" (109 U. S. 3), the Court held that the Fourteenth Amendment is prohibitory upon the States only, and that it does not invest Congress with the authority to legislate as to the conduct of individuals in society toward each other; that such authority is wholly within the domain of State legislation.

As stated in the *Cyclopedia of American Government*, Vol. II, page 41, these decisions establish the following principles: "(1) that the prohibitions of the Fourteenth Amendment are addressed to the States as such and not to private individuals; (2) that these prohibitions contemplate only positive state acts and not acts of omission; (3) that the amendment recognizes a distinction between state citizenship and United States citizenship; (4) that it protects from state abridgment only the privileges and immunities which the Constitution by its other provisions bestows upon 'citizens of the United States' as such."

This Amendment had one effect, however, that was not anticipated by its framers. Its first clause provides that "*all persons born or naturalized in the United States, \* \* \* are citizens of the United States and of the State wherein they reside.*" Its purpose was to make the newly liberated slave a citizen of the United States, and also of the State of his residence. In *United States v. Wong Kim Ark*, 169 U. S. 469, however, the Supreme Court held that it also confers citizenship upon all Chinese, Japanese, and other nationalities *born in*

*this country*, who are otherwise not entitled to become citizens under our naturalization laws.

### XV AMENDMENT

The Fifteenth Amendment was likewise the result of slavery and the Civil War. Its purpose was to protect the newly created colored citizen in the exercise of his right to vote; it forbade any State to deny or abridge that right "*on account of race, color or previous condition of servitude.*" It was proposed by Congress February 27, 1869, and declared adopted March 30, 1870. It was rejected by California, Delaware, Kentucky, Maryland, Oregon, and Tennessee.

### XVI AMENDMENT

Like the Eleventh, the Sixteenth Amendment was the result of an unpopular decision of the Supreme Court. The fourth paragraph of Section 9, Article I, of the Constitution provides that "*no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.*" In 1894 Congress attached a rider to the Wilson-Gorman Tariff Act imposing an income tax of 2% upon all incomes in excess of \$4,000 received from any source whatsoever by persons, firms, corporations, or associations. One Pollock, a stockholder in the Farmers Loan and Trust Company, of New York, sought to enjoin the company from the payment of the tax on the ground that the law violated the above quoted provision of the Constitution. The case reached the Supreme Court in *Pollock v. Farmers Loan and Trust Company*, 157 U. S. 429. On April 8, 1895, a majority of the Court held (1) that a tax on income de-

rived from real estate is a direct tax, which Congress was forbidden to lay; and (2) that a tax on income derived from state and municipal bonds was invalid since it was a tax on the necessary instruments of government. Judge Jackson not sitting because of illness, the Court divided equally on (1) whether a tax on income derived from corporate stocks and bonds and other personal property was a direct tax; and (2) whether the entire act was invalid.

A re-argument of the case was ordered; decided May 20, 1895, and is reported in 158 U. S. 601. In the meantime Justice Shires had changed his views since passing on the previous case, and the whole act was held unconstitutional by a five to four decision.

This decision resulted in numerous political attacks upon the Court, and agitation was immediately begun for an amendment to the Constitution which would authorize the collection of an income tax. Notwithstanding the dissatisfaction over the decision, it was fourteen years before Congress proposed the Sixteenth Amendment on July 31, 1909. It was before the States for three years, six months, and twenty-four days (the longest time that any Amendment has been under consideration) before it was approved and duly proclaimed adopted February 25, 1913. This Amendment was rejected by Connecticut, Rhode Island and Utah.

Not all incomes, however, are taxable under this Amendment. In *The Collector v. Day*, 11 Wall, 113, the Supreme Court said that both the Federal Government and the States are "separate and distinct sovereignties \* \* \* within their respective spheres", each independent of the other, and that neither may interfere with the other in the free and full exercise of its powers.

In *McCulloch v. Maryland*, 4 Wheaton, 316, Chief Justice Marshall said that a State has no power to tax the instrumentalities of the Federal Government, and in *Texas v. White*, 7 Wall, 700, as well as in many later cases, the Court has held the converse of this proposition to be true. Hence, the Federal Government may not tax the States or their subdivisions, or their instrumentalities, for carrying on governmental functions. It follows, therefore, that income derived from interest on State, county, and municipal bonds, when issued for governmental purposes, are not subject to the payment of Federal income tax. In *South Carolina v. United States*, 199 U. S. 437, however, it was held that when a State, or any of its sub-divisions, engages in a business which is not governmental in its nature, it is subject to all lawful Federal taxes on such business. Nor is the salary of a State officer, judge, etc., subject to the payment of a Federal income tax. This exemption is likewise upon the theory that the dual sovereignty in the Federal and State Governments prohibits either from taxing the governmental instrumentalities of the other.

Under the provisions of Section 1, Article III, of the Constitution, the salaries of all Federal Judges are likewise exempt from the operations of this Amendment. The Income Tax Act of 1919, among other things, required all Judges of United States Courts to report and pay an income tax on their salaries. In *Evans v. Gore*, 253 U. S. 245, however, the Supreme Court held such provision of the Act in contravention of the above cited constitutional provision, which provides that Federal Judges shall, at stated times, receive for their services a compensation "*which shall not be diminished during their continuance in office.*" The purpose of this pro-

vision, as said by John Marshall, was to render the Judge "perfectly and completely independent, with nothing to influence or control him but God and his conscience." Apart from his salary, however, a Federal Judge is as much within the taxing power of the Government as other men are. Likewise, the President is exempt from the payment of income tax on his salary.

## XVII AMENDMENT

The manner of selecting United States Senators was the subject of no little discussion in the Constitutional Convention. The plan of government submitted by Governor Randolph, of Virginia, provided for their selection by the Lower House of Congress from a list of persons submitted by the legislatures of the several States. James Wilson of Pennsylvania strongly favored their election by the people. A compromise was agreed upon whereby they were to be elected by the legislatures of the respective States. Agitation for the popular election of Senators, however, began at an early date. Such a Resolution was introduced in Congress during the administration of John Quincy Adams, but it attracted little attention. In 1869 President Johnson recommended such an amendment in his message to Congress. In 1892 the proposal was endorsed in the platform of the Populist party. In 1900 the Democratic party likewise endorsed it. In 1894, and at intervals thereafter, the House of Representatives passed such a Resolution, but each time it was defeated in the Senate. The adoption of primary election laws by many of the States, however, changed the attitude of the Senate, and in 1911 that body likewise approved the resolution submitting such an amendment to the States.



It was approved by the legislatures of the required three-fourths of the States and declared adopted May 31, 1913.

The wisdom of this amendment, however, is still doubtful. There are few among those who have closely observed the personnel of the United States Senate in recent years who would assert with assurance that it has resulted in a higher quality of statesmanship in our first law-making body, or that the Nation has been better served since its adoption.

### XVIII AMENDMENT

No constitutional amendment in our history was agitated through so many years as that relating to prohibition, and no amendment has excited such universal controversy or resulted in such general disregard of its inhibitions. Even prior to the Civil War some of the States had adopted prohibition. In 1872 the Prohibition party was organized for the purpose of fighting the legalized liquor traffic from a political angle. This was followed in 1874 by the Woman's Christian Temperance Union, the object of which was likewise the destruction of the liquor business. The organization spread until it reached practically every community in the country. About the year 1890 many prominent men throughout the Nation became interested in the evil influence of the saloon and began to work for its complete elimination. This resulted in the organization of the Anti-Saloon League in May 1893, which carried on a well organized and adequately financed campaign in favor of constitutional prohibition. So effective had been all this work that when Congress, as a war measure, in July 1917, forbade the manufacture and importation of liquor for

beverage purposes, eleven States already had constitutional prohibition; ten States had statutory prohibition; and five other States had prohibition amendments to their constitutions in process of adoption. Such was the attitude of the country on this question when Congress, on December 19, 1917, submitted the Prohibition Amendment to the States. It was immediately approved by forty-six States, and by its own provision became effective January 16, 1920.

With much justification the opponents of this Amendment contend that it is an infringement upon the historic principles of States Rights, against which Jefferson inveighed and Patrick Henry thundered; that the framers of the Constitution never intended that the people of one State should regulate or supervise the conduct of citizens of another State; that the founding fathers divided all governmental powers between the Nation and the States; that the former was intrusted with all matters of a strictly national character, such as foreign relations, interstate and foreign commerce, postal service, monetary system, patents and copyrights; that everything else was delegated exclusively to the States, and any departure from that principle is in violation of the spirit with which our government was originally endowed. On the other hand, the advocates of the Amendment maintain that the Constitution was made for the people and not the people for the Constitution; that such instrument is not, and was never intended to be, a straight-jacket; that by its own provisions it may be amended at any time so as to make it more expressive of the will and desire of a majority of the American people. Both sides are undoubtedly correct.

This Amendment provides that "*the several States shall have concurrent power to enforce this Article by appropriate legislation.*" The States of Connecticut and Rhode Island rejected it. Maryland failed to enact a State enforcement statute. The States of Massachusetts, Montana, Nevada, New York, Rhode Island, Wisconsin, and Wyoming have repealed their State enforcement laws which were enacted shortly after the adoption of the Amendment. In effect, these States have served notice on the National Government that they have nullified this provision of the Constitution and will not assist in the enforcement of the Volstead law enacted in pursuance thereof. Everywhere we hear a revival of the same old argument enounced by Hayne, of South Carolina, in his great debate with Webster and which we vainly hoped had been settled at Appomattox, namely, that the framers of the Constitution did not expect or intend that a law could be passed by Congress that was binding on a State when the people of that State did not wish it so. Hence, all thoughtful persons are led to inquire "what shall the end be?" Will history repeat itself? Are we to have another Whiskey Rebellion?

There seems to be a widespread demand for a referendum, or popular vote, as to whether we shall continue this Amendment. Whether such demand comes from any considerable number of our people is impossible to determine. Ascertainment of the will of a multitude, except by the ballot, is an impossibility; minorities seem always to be extremely vocal, majorities dumb. It is certain, however, that the Constitution makes no provision for a referendum as to any of its provisions. Only the two methods, hereinbefore stated, are pro-

vided by the Constitution for effecting a change in any of its provisions. In 1920 the Supreme Court of the United States held in six cases arising in Kentucky, Massachusetts, Missouri, New Jersey, Rhode Island, and Wisconsin that the referendum provisions in the Constitution of those States did not apply to the ratification of an amendment to the Federal Constitution. One of the two methods provided for amending the Constitution does suggest an indirect way by which the people could express their views on this engrossing question.

By a vote of two-thirds of a quorum of both Houses, Congress may propose an amendment to the Constitution either to modify or to negative the effect of the Eighteenth Amendment (no clause of the Constitution and no Amendment thereto may be repealed and removed therefrom), and may order that a convention composed of delegates chosen by the people be held in each State to act upon such proposed amendment. If the conventions in three-fourths of the States approve the proposed amendment, the Eighteenth Amendment shall become of no effect; if less than that number, it shall remain in force.

### XIX AMENDMENT

Like prohibition, woman's suffrage became an accomplished fact only after years of constant agitation and ceaseless labor on the part of those who sponsored the reform. It is indeed the crowning achievement in the centuries of struggle to elevate women to their rightful place as the co-partner and co-equal of men. The outstanding leader in the movement was Susan Brownell Anthony, and in her honor this great constitutional

reform is known as the "Susan B. Anthony Amendment". It was first introduced in Congress in 1868, but met only ridicule. The agitation, however, continued with vigor down through the years, the sponsors of the movement centering their fight, with considerable success, in many of the less conservative States. The present Amendment was proposed in Congress June 5, 1919, after President Wilson had recommended it in a special message. It was accordingly submitted to the States, ratified, and officially proclaimed adopted August 26, 1920. It was no untried experiment, however, in many of the States. In 1869 Wyoming Territory extended complete suffrage to women on equal terms with men, which it continued after statehood. It was followed by Colorado in 1893; Idaho in 1896; Utah in 1896; Washington in 1910; California in 1911; Arizona in 1912; Kansas in 1912; Oregon in 1912; Alaska Territory in 1913; Nevada in 1914; and Montana in 1914; while twenty-nine States had granted limited suffrage to women in such matters as school and bond elections. This Amendment was rejected by Alabama, Virginia and Maryland.

## XX AMENDMENT

(Proposed)

In February, 1932, Congress proposed the Twentieth Amendment to the Constitution. Should it be adopted it will be the first structural change in our fundamental law since the adoption of the Twelfth Amendment in 1804. Since the beginning of our Government both the President and members of Congress have assumed office on March 4, following their election. The Constitution requires Congress to convene annually on the first

Monday in December. Following each election the old Congress continues in session from the first Monday in December till March 4, when the newly elected members come into office. Unless called into extraordinary session, however, the new Congress does not convene until the first Monday in the following December,—thirteen months after its election. Should the proposed Amendment be adopted the new Congress will convene January 3, two months after its election, and the President will be inaugurated seventeen days later — January 20.

Only time will determine the wisdom of this proposed Amendment, should it be adopted. It may be said, however, that there is no urgent necessity for such change. On the contrary, there are a few sound objections to be urged against it: First, in the heat and stress of a bitter political campaign it is possible that the people might endorse a particular principle or “ism” which, in calmer moments, would speedily be condemned. With Congress convening so soon after the election, it is highly probable that its members would yield too readily to public clamor and enact legislation which they would unhesitatingly reject if more time for deliberation were required. Second, the proposed Amendment fixes no limit to the length of the second session of Congress; hence, under the proposed Amendment, that body may sit continuously,—a calamity from which the country should be spared.

## CHAPTER VIII

### GENERAL GUARANTIES

*God grants liberty only to those who love it, and are always ready to guard and defend it.*

DANIEL WEBSTER.

NO GOVERNMENT was ever instituted among men for a higher purpose than that created by our Constitution. The opening paragraph of that instrument clearly states its full purpose as follows: "*To form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common Defense, promote the general Welfare, and secure the blessings of Liberty to ourselves and our Posterity.*" Tested by these high resolves it has accomplished every purpose for which it was designed, and succeeded even beyond the dreams of the most sanguine of its framers. This phenomenal success is due wholly to its personal and political guaranties of freedom which constitute our charter of political, civil, and religious liberty. These guaranties are discussed in this and subsequent chapters under the titles of General Guaranties, Guaranties in Criminal Cases, Guaranties in Civil Cases, and Political Guaranties.

#### HABEAS CORPUS

Among its most priceless guaranties, the Constitution provides in Section 9, Article I, that "*The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.*" This writ is the most famous, as well as the most ancient, of the law. Freely trans-

lated it means "that you have the body." Its origin is shrouded in the mists of antiquity, but it probably came from the Roman Law. It is often called the "great writ of liberty", and was regarded by the American colonists as their most valuable birthright. Therefore, in the Constitution they enjoined its suspension except "*when in Cases of Rebellion or Invasion the public Safety may require it.*" The privilege of the writ, however, is suspended whenever martial law is declared in force. As said by Blackstone "Then the Nation parts with a portion of its liberty to secure its permanent welfare, and suspected persons may then be arrested without cause assigned."

The writ is issued by a court or judge upon the petition of a person in custody, or of one who claims to be the rightful custodian of a person wrongfully held by another. It requires the officer, or other individual, charged in the petition with the unlawful detention, immediately to produce (have the body of) the person so charged to be illegally detained before the court or judge issuing the writ, so that the reasons for his detention may be inquired into and the person released without delay if it be found that he is unlawfully detained. No court or judge may lawfully refuse to issue such writ upon a proper petition, and no cell or dungeon is strong enough to bar its entrance. Upon a hearing on the writ, if it appear that the petitioner is being held upon a proper and valid warrant, or that the individual holding such person is his legal custodian, the petition is dismissed and the matter ends.

Prior to the American Revolution there were long periods in English history when the writ of *habeas corpus* was suspended or inoperative because of the sub-



servience of the courts to the Crown. During those centuries hundreds, perhaps thousands, of innocent but helpless victims starved and died in prison without relief. The people, however, did not always submit quietly to such tyrannies. For directing his judges to refuse to issue writs of *habeas corpus*, King John was called to account by his outraged subjects at Runnymede in 1215 and forced to sign the *Magna Charta*, while four centuries later Charles I lost both his crown and his head for a like offense. It was likewise one of the offenses charged against George III in the Declaration of Independence.

In *Ableman v. Booth*, 21 Howard, 506, Chief Justice Taney held that under our dual system of government State courts or judges cannot inquire by *habeas corpus* into the validity of arrest or detention of a person on Federal process. Redress in such cases must be sought in Federal Courts. On the other hand, however, Federal Courts and judges may inquire into the detention of one by State Courts when it is averred in the petition that such person is being deprived of some right guaranteed to him by the Federal Constitution.

#### BILL OF ATTAINDER

Section 9, Article I, of the Constitution denies to Congress the power to pass a *bill of attainder*, while Section 10, of the same Article, places a similar injunction on the authority of the States. The term *bill of attainder* applies to criminal cases only and, while such inhibitions may seem of little importance to us, they were, nevertheless, of very great concern to the people when this Republic was formed. At that time, and for centuries prior, it had been the law in England that a

conviction and judgment for treason or felony, or judgment of "outlawry" upon a fugitive from justice, was followed by "Attainder", the consequences of which were (1) forfeiture to the crown of all the property of the accused, and (2) the "corruption of blood", which meant that the accused could neither inherit nor transmit lands. Such measures were common under despotic governments which wanted to rid themselves of political enemies, or even those who had simply incurred the displeasure of the King. These acts were frequently passed with but little, and sometimes no, evidence to justify them. Such cruelties were not officially abolished in England until the passage of the Forfeiture Act in 1870. Our Constitution, however, not only denies such authority to both Congress and the States generally, but Section 3, of Article III, likewise denies such power to Congress even in cases of conviction for treason. It is a fundamental principle of our jurisprudence that all criminal punishment terminates with the death of the guilty person; his children are exempt.

#### EX POST FACTO LAWS

Section 9, Article I, of the Constitution denies to Congress the power to enact *ex post facto* laws; while Section 10 of the same Article, deprives the States of like authority. Such laws apply to criminal cases only, and sustain no relation to civil matters. The latin term "*ex post facto*", freely translated means "after the deed is done", and any law that makes an act criminal which was not so when committed, or which inflicts a greater punishment than was attached to the offense at the time of its commission, or which in any manner alters the situation of the accused to his disadvantage, is an *ex*

*post law* within the meaning of these constitutional inhibitions.

By these provisions the framers of our Constitution forever guaranteed the people against the blighting effects of an evil that had been practiced for centuries by despotic governments to rid themselves of undesirable individuals who had committed no crime, or at most only minor offenses. These inhibitions embrace the following laws: (1) every law that makes an act done before its passage, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime, or makes it greater than it was when committed; (3) every law that changes the nature of the punishment, or inflicts a greater punishment than the law attached to the crime when committed; (4) every law that changes the legal rules of evidence so as to make it less difficult to convict the offender; (5) every law which deprives persons accused of crime of some lawful protection or right to which they have become entitled.

#### TITLES OF NOBILITY

At the time our Constitution was written the conferring of hereditary titles of nobility, which carried certain social and political privileges, was the custom in all civilized governments. To destroy all such special privilege and establish that absolute equality before the law, which is essential in a democracy, the framers of that instrument declared in Section 9, Article I, that "*No Title of Nobility shall be granted by the United States.*" This provision was taken from the Articles of Confederation. The framers of the Constitution, however, did not stop here, but forbade any officer of the

United States to accept "*any present, Emolument, Office, or Title of any kind whatever, from any King, Prince, or foreign State*", without the consent of Congress. Moreover, so intent were they upon protecting the people against foreign influence and artificial casts and classes in society, that they went even further and provided in Section 10, Article I, that "*No State \* \* \* shall grant any Title of Nobility.*"

These constitutional declarations also marked another revolutionary departure from Old World systems, where for centuries the people had been cursed by the deadening cast system in which no boy or girl could hope to rise above the work done by, or the social position of, his father. In the American experiment the door of opportunity is thrown ajar to rich and poor, high and low, alike. The only aristocracy known in our Republic is one of brain and character.

#### TREASON

The crime of treason is as old as organized government and was formerly much broader in its scope than now. In England, at the beginning of our Revolution, it embraced seventeen separate offenses. It is also true that the crime was not clearly defined by law, and the charge was not infrequently resorted to by unconscionable kings to rid themselves of enemies as well as of those who may have simply incurred their royal displeasure. In many instances what law existed "was considerably strained in order to secure a conviction." As a result many innocent men and women unjustly suffered the horror of its awful penalties.

Until 1814 the punishment for treason in England was a form of torture scarcely conceivable in this en-

lightened day. If the accused was a man, it was ordered that he be "hanged by the neck but not until he be dead, and that while yet alive he be disemboweled and that then his body be divided into quarters, the pieces to be at the disposal of the Crown." If the offender was a woman, more leniency was shown, and she was burned at the stake. All those so convicted, however, regardless of sex, were "attainted"; that is, their property was forfeited to the Crown.

To secure the people against such oppression the framers of our Constitution in Section 3, Article III, clearly defined what shall constitute the crime of treason as follows: "*Treason against the United States shall consist only in levying war against them, or in adhering to their Enemies, giving them aid and comfort.*" It is the only crime defined in the Constitution, and Congress has no power to enlarge or restrict its meaning. As thus defined it consists of two offenses: (1) levying war against the United States; (2) adhering to their enemies, giving them aid and comfort. To constitute "levying war" there must be an assemblage of persons with force and arms whose purpose is to overthrow the government or resist its laws, and all who aid in furtherance of such common object, in however minute a degree, are guilty of treason. The term "enemies" applies only to subjects or citizens of a foreign power in a state of open hostility with the United States.

Our Constitution not only defines treason, but further safeguards the accused by prescribing the evidence necessary to sustain a conviction. It provides that "*No person shall be convicted of Treason unless on the Testimony of two witnesses to the same overt Act, or on Con-*

*fession in open Court.*" The term "*two witnesses to the same overt act*" means that two persons must appear in court and testify that they personally saw the accused commit the act. The term "*overt act*" means an act "openly committed", and such act must unmistakably show the levying of war against the United States, or giving aid and comfort to their enemies. To climax our departure from the English rule, the founding fathers provided that "*no attainder of Treason shall work corruption of Blood, or Forfeiture except during the life of the person attainted.*"

The Constitution, however, authorizes Congress to prescribe the punishment for treason which has been fixed at death, or, in the discretion of the court, at imprisonment at hard labor for not less than five years and a fine of not less than \$10,000. All persons charged with treason against the United States, except those in the military or naval service, must be tried in the Federal Courts, and, if convicted, are incapable thereafter of holding any office under the United States.

In the first and greatest treason trial in this country, *United States v. Aaron Burr*, 1807, Chief Justice Marshall held that "treason can only be established by the proof of overt acts, and \* \* \* those overt acts only which are charged in the indictment can be given in evidence"; that is, the indictment must particularly describe the "overt acts" and aver when, where, and how they were committed, and the charge must be proved as laid. "In no other way," said Marshall, "can the accused enjoy his rights under the Sixth Amendment to the Constitution *to be informed of the nature and cause of the accusation* against him, or properly prepare his defense." The indictment charged Burr with levying

war against the United States on Blennerhasset Island, yet it was conceded by the Government that Burr was not present on the island at the time, but was several hundred miles distant in the State of Kentucky. The prosecution, however, contended that the fact that Burr had instigated the alleged plot made him guilty of "constructive treason." Marshall held that the cruel English doctrine of "constructive treason", which had claimed many an innocent victim, did not prevail under our Constitution. "This achievement", says Beveridge in his Life of Marshall, "was one of his noblest services to the American people."

There may also be treason against a State. This is defined and the punishment therefor is fixed in the Constitutions of the several States. The most celebrated trial for this offense was that of John Brown at Charles Town, Virginia, (now West Virginia), in 1859, in which the accused was convicted and executed for treason against the Commonwealth of Virginia.

### RELIGIOUS LIBERTY

The history of nations for the first seventeen hundred years of our Christian era is largely a record of the irreconcilable struggle between religious bigotry on the one side and an ever growing liberalism on the other. In the name of Him who taught a Gospel of love, millions of men, women and children were robbed, plundered, hunted with dogs, exiled, imprisoned in dungeons, hanged, drawn and quartered, massacred, fed to wild beasts, and burned at the stake. In vain men everywhere hoped, prayed, fought, and died for religious liberty, that is, the absolute equality of all religions before the law. It was this persecution in Europe that

led to the settlement of many of the American Colonies, and one of the inexplicable mysteries of human nature is that these early pioneers, who braved the terrors of the Atlantic, the hardships of the wilderness, and the danger from savages, to secure religious liberty, should, when once established, begin a systematic persecution of those who differed with them.

At the beginning of the American Revolution every country in the world, and all the American Colonies, except Rhode Island, (and even it denied Catholics the right to vote) had an established religion which was protected and supported by law. It was not long, however, until a decided liberalism began to take firm root in America. Virginia led the way in 1776 by the adoption of a Bill of Rights, which owed its origin to the fact that, throughout the Southern Colonies, the clergy and the leading members of the established church (Church of England) were Tories and bitterly hostile to the Revolution. In 1785 Virginia crowned the centuries of struggle for religious freedom by the enactment of Jefferson's justly celebrated "Statute of Religious Liberty." As said by its author, this statute was designed to "comprehend within the mantle of its protection the Jew and Gentile, the Christian and the Mohammedan, the Hindu and the Infidel of every denomination." So important did Jefferson regard this statute that he included it among his three great achievements which he directed to be included in his epitaph and inscribed on his gravestone.

In the meantime, the spirit of liberalism in America had become so general that When Charles Pinckney, on August 30, 1789, moved in the Philadelphia Convention to include in the Constitution the clause "*but no religious test shall ever be required as a qualification to*



*any office or public trust under the United States*", (Article VI), Roger Sherman observed that its inclusion was unnecessary—"the prevailing liberality being a sufficient security against such tests"; nor was a single vote cast against its inclusion. But neither this provision nor the "prevailing liberality" of the people were sufficient to satisfy the redoubtable Patrick Henry and, at his instance, the first clause of the First Amendment—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—was written into our fundamental law as a further guaranty against religious intolerance and oppression.

In this great reform America, likewise, led the world. It was the first, and for a long time the only, country to write the principle of absolute religious freedom into its fundamental law. The States were quick to follow the example of the Federal Government, and the same or similar guaranties are now found in the Constitution of every State. Nowhere in this country can any restraint be put on the free exercise, expression or promulgation of any religion. This freedom, however, may not be used as a shield for the commission of crime or to excuse acts inconsistent with the peace and safety of the State.

#### FREEDOM OF SPEECH AND PRESS

In the First Amendment is found another important guaranty, namely, "*Congress shall make no law \* \* \* abridging the freedom of speech or of the press.*" A similar provision has been incorporated in the Constitutions of the several States. These provisions, however, may not be construed to mean that this constitutional liberty of the press renders it immune from civil and criminal liability for its utterances, or that it is not sub-

ject to regulation. This guaranty means today exactly what it meant under the common law when the Constitution was written. This was best expressed by Blackstone as "in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; \* \* \* but if he publishes what is improper, mischievous, or illegal, he must take the consequences \* \* \* ."

One may not plead this constitutional guaranty as a defense for the publication or utterance of libelous or slanderous statements to the injury of another person, or his business. Neither is it a defense for inciting a breach of the peace or riot; nor may it be used as a shield for inciting rebellion against our government, or advocating its overthrow by force and violence. One is also criminally liable for the publication of obscene, indecent, blasphemous or scandalous matter.

The States may likewise punish criminally those who publish seditious statements advocating revolution and murder. In *People v. Most* (New York), 171 N. Y. 423, 64 N. E. 175, it is stated that the Constitution of that State places no inhibition "upon the power of the legislature to punish the publication of matter which is injurious to society according to the standards of the common law—it does not deprive the State of the primary right of self-preservation." The greatest pronouncement upon this subject, however, was by the Supreme Court of the United States in *Milwaukee Publishing Company v. Burleson*, 255 U. S. 407. "Freedom of the press", said the Court, "may protect criticism and agitation for modification or repeal of laws, but it does not extend to protection of him who counsels and

encourages the violation of the law as it exists. The Constitution was adopted to preserve our government, not to serve as a protecting screen for those who, while claiming its privileges, seek to destroy it."

#### RIGHT OF ASSEMBLY AND PETITION

The First Amendment further provides that "*Congress shall make no law respecting \* \* \* the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*" This clause establishes two rights, namely, (1) the right of peaceable assembly; (2) the right to petition the Government. Congress, however, is powerless to enforce either guaranty, for it "*shall make no law respecting*" either. The power to maintain them, therefore, lies wholly with the States, but since all the States have incorporated the same or a similar provision into their constitution, these guaranties are everywhere assured. The right of *assembly* is not limited to petitioning "*the Government for a redress of grievances*", but may be exercised for social, religious, political, commercial, or any other lawful purpose. To be entitled to the protection of the State, however, such assemblages must be for a peaceable and lawful purpose, and must remain peaceable. When people congregate for an unlawful purpose or attempt any unlawful action after coming together, such assemblage then becomes a mob which may be dispersed by the police.

#### THE RIGHT TO KEEP AND BEAR ARMS

The Second Amendment, highly important when adopted, is of less consequence today. It reads: "*A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear*

*arms, shall not be infringed.*" Its object was threefold: (1) securing the people against Federal interference in their right to keep and carry arms for protection against savage foes and supplying food; (2) by keeping control over their militia the States would retain in a small degree, at least, a portion of the sovereignty they enjoyed before the adoption of the Constitution; (3) by control of their militia the States felt that they would possess the means of repelling by physical force any unconstitutional encroachment upon their rights by the untried Federal Government. The arms here referred to are such as are usually carried by militia, and have no reference to pistols and other deadly weapons carried by lawless persons. Moreover, the Amendment is a limitation on the authority of the National Government only, and like the other amendments in our Bill of Rights it does not apply to the States. Therefore, in the absence of any restrictive clause in their constitutions, the States may legislate as they please regarding the carrying and using of arms.

Under the provisions of Section 8, Article I, of the Constitution, however, Congress has power "*To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions*", and "*To provide for organizing, arming and disciplining, the militia, and for governing such parts of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress*"; while Section 2, Article II, designates the President as Commander in Chief of such militia, "*when called into the actual Service of the United States.*"

## CIVIL AND MILITARY AUTHORITY

Prior to the Revolution the English Government kept large bodies of troops scattered throughout the Colonies. The purpose was to over-awe the people and keep them in subjection. Such troops recognized no superior power in the civil authority and quartered themselves in private homes at will. This became the source of a deep-seated grievance among the colonists and was the subject of bitter complaint in the Declaration of Independence. To prevent a recurrence of this evil as well as to establish the superiority of the civil over the military authority, the Third Amendment declared that "*No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.*" This Amendment accomplished two purposes: (1) it made the quartering of soldiers in time of peace depend on the consent of the owner of the house, and in time of war on the law; (2) it placed the military policy of the United States under the control of the civil authorities.

## SUMMARY

Under these constitutional guaranties our liberties are protected by the writ of *habeas corpus*; the inhibition against the enactment of a *bill of attainder* or an *ex post facto law*; the ban against the creation of titles of nobility; restrictions in all prosecutions for treason; entire religious liberty; freedom of speech and press; the right of assembly and petition; the right to keep and bear arms; and the subordination of all military to the civil authority.

## CHAPTER IX

### GUARANTIES IN CRIMINAL CASES

*Let reverence for the law be breathed by every mother to the lisping babe that prattles on her lap; let it be taught in schools, seminaries, and colleges; let it be written in primers, spelling books and almanacs; let it be preached from pulpits, and proclaimed in legislative halls, and enforced in courts of justice; let it be the political religion of the nation.*

ABRAHAM LINCOLN.

**A**MONG the notable guaranties in the Constitution are those designed for the protection of persons accused of crimes against the United States. They are found in Section 2, Article III, and in the Fifth, Sixth, Seventh, and Eighth Amendments, and were wisely wrought to preserve those individual rights, the violation of which had been so vigorously decried in the Declaration of Independence. While they relate to criminal trials in Federal Courts only, like guaranties have been incorporated in the constitutions of the several States. Their value to the individual citizen is incalculable, for they form the bulwark of American freedom and are our assurance against a repetition of those governmental abuses and tyrannies which crushed the liberties of mankind from the dawn of history till the birth of the American Republic. It is also well to note that Federal Courts have no common law criminal jurisdiction. Their powers in that respect are restricted to those conferred by the Constitution and the Federal statutes enacted in pursuance thereof.

The constitutional guaranties in criminal cases will be discussed in their relation to each other rather than in the order in which they appear in the Constitution.

## INDICTMENT

The Fifth Amendment provides that "*no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.*" This provision simply means that before an accused person may be brought to trial for a felony (a crime punishable by death or confinement in the penitentiary) there must be an inquiry by a grand jury to ascertain whether a crime has been committed and, if so, whether there is probable cause to believe that it was committed by the accused. If the grand jury so find, it returns an indictment into court, which is a written accusation formally charging the accused with the commission of the offense. The grand jury contemplated by the Constitution is a common law grand jury, as it existed in the States when the Constitution was written. In the Federal Courts such jury consists of not more than twenty-three nor less than sixteen men, and requires the concurrence of at least twelve to return an indictment. Such jury is a body of Independent citizens representing the people, and an indictment returned by it is in effect a charge made by the people against the accused. Its proceedings are secret and its members are sworn not to divulge them. It may not be coerced by either the Judge or the prosecuting officer, nor may it be abolished in Federal Courts without an amendment to our Constitution.

## BAIL

The Eighth Amendment provides that "*excessive bail shall not be required*" of one charged with crime.

Upon being brought into court on an indictment, the accused may plead "guilty" and accept his sentence, or he may plead "not guilty", have a day fixed for his trial, and give bond (bail) for his appearance before the Court on that day. Under this provision his bond may not be made excessive, but must be reasonable and commensurate with the gravity of the offense charged. Should the accused be unable to furnish bond he is remanded to jail to await his trial. Likewise, if the defendant should be convicted and desire to appeal, excessive bail may not be required.

#### NOTICE TO ACCUSED

When indicted for a crime in the Federal Courts, the accused is not forced blindly into trial. The Sixth Amendment requires that he "*be informed of the nature and cause of the accusation against him.*" This information is usually supplied by furnishing him with a copy of the indictment or charge lodged against him by the grand jury.

#### WITNESSES FOR ACCUSED

The Sixth Amendment further provides that the accused shall "*have compulsory process for obtaining witnesses in his favor.*" This means that the Court must exercise its judicial powers to compel the presence at the trial of all witnesses for the defense and require them, under oath, to state what they may know about the matters under consideration. This is true regardless of whether the accused is financially able to compensate such witnesses or not.

#### SPEEDY AND PUBLIC TRIAL

The Sixth Amendment also provides that "*In all*



*criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.*" This means that no longer may one accused of an offense be lodged in jail and held indefinitely without trial, but the Government must be ready to try him without unreasonable delay. If such trial is denied or delayed beyond what may be considered a reasonable time for the prosecution to prepare for trial, it is a denial of this constitutional right, and the accused will be discharged from custody upon a writ of *habeas corpus*.

The accused is also entitled to a public trial. No longer may one be tried in a "star chamber" court, away from friends to advise and comfort him. A public trial, however, is not necessarily one to which every one may be admitted, but it must be sufficiently open to allow the friends of the accused and others to witness the proceedings if they desire.

#### PLACE OF TRIAL

Under the provisions of Section 2, Article III, and the Sixth Amendment, the trial of an accused shall be held in "*the State and district wherein the crime shall have been committed.*" He may not be transported to some distant point for trial, where it would be impossible to secure the attendance of his witnesses,—a procedure which was decried in the Declaration of Independence.

One example is sufficient to show how scrupulously this guaranty is enforced by our Federal Courts. In 1909 the Indianapolis News published certain facts concerning our acquisition of the Panama Canal Zone, and also expressed the conclusion that certain persons connected therewith were guilty of "thieving" and "swin-

dling". A few papers containing the article were mailed to subscribers in Washington, D. C. Smith and Edwards, publishers of the paper, were indicted in the Federal Court of the District of Columbia for libel. An application was made to the United States District Court at Indianapolis for an order for their removal to Washington for trial. The defendants resisted the application and, in *United States v. Smith*, 173 Fed., 227, the Court held such application to be in violation of this provision of the Constitution. In concluding his opinion, Judge Anderson said: "To my mind that man has read the history of our institutions to little purpose who does not look with grave apprehension upon the possibility of the success of a proceeding like this. \* \* \* If the prosecuting officers have the right to select the tribunal \* \* \* , if the government \* \* \* can drag citizens from distant States to the Capital of the Nation, there to be tried, then, as Judge Cooley says, this is a strange result of a revolution when one of the grievances complained of was the assertion of the right to send persons abroad for trial."

#### TRIAL BY JURY

Section 2, Article III, and the Sixth Amendment likewise guarantees an accused a trial "*by an impartial jury*", that is, a jury whose minds are free from bias or prejudice either for or against him. The jury guaranteed the accused by this provision is a jury as it was known and constituted in the States at the time the Constitution was written and consists of twelve men, whose verdict must be unanimous.

Unmindful of the centuries of struggle it required to wrest the right of trial by jury from despotic monarchs,

certain would-be reformers, who know little or nothing of our jury system or its benefits, are ceaselessly trying to undermine the faith of the people in their courts and in this constitutional guaranty of *trial by jury*. While it may be true that on rare occasions a jury may, through inexperience or corruption, fail in its duty, yet it remains true that man in his wisdom has never devised a better plan for dealing with the life and liberty of the individual than by trying him before a jury of his peers. This system had its origin at the very dawn of the Anglo-Saxon civilization, survived all the storms and revolutions that swept the English Isles, was transferred to the shores of America where it remains one of the fixed and essential parts of our jurisprudence. Without it the administration of our criminal law would become tyranny.

Our Federal Courts have been vigilant in guarding this sacred right of trial by jury, even in times of national emergency. The case of *Ex Parte Milligan*, 4 Wall. 121, is the most notable example. In 1864 Milligan was arrested at his home in southern Indiana by the military authorities and charged with treason against the United States. He had never been in either the military or naval service, the State was not in rebellion, and its courts were open and functioning. Nevertheless, the accused was tried before a military court, found guilty, and sentenced to be executed. Milligan filed his petition in the United States Circuit Court at Indianapolis alleging that the military court was without jurisdiction in the premises, and praying that he either be brought before a proper civil court for trial or discharged from custody. The Court certified the case to the Supreme Court, which held the military

court without authority and ordered the release of the petitioner.

On the failure to try the accused before a jury in the civil courts, Justice Davis, speaking for the Court, said: "No graver question was ever considered by this Court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen, when charged with crime, to be tried and punished according to the law. \* \* \* Time has proven the discernment of our ancestors; for even these provisions, (Sixth Amendment) expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. \* \* \* ." The established rule of construction in such cases is that the civil courts are supreme over military courts in all places not within the immediate theatre of war.

## WITNESSES FOR PROSECUTION

Under the provisions of the Sixth Amendment the accused shall "*be confronted with the witnesses against him.*" This means that all witnesses against the accused must give their testimony in open court and submit to cross-examination by counsel for the defendant. The Government may not take the depositions of absent witnesses and read the same to the jury as evidence against a defendant. It has been held, however, that this constitutional right is not infringed by admitting in evidence the stenographer's notes of the testimony on a former trial given by a witness who has since died; the constitutional guaranty having been satisfied when the accused was confronted by the witness during the first trial. Dying declarations (statements made in anticipation of death) may also be given in evidence against the accused in homicide cases. This was the established rule of evidence in the States when the Constitution was written and is, therefore, included in its meaning. A defendant, however, may take and read depositions in his defense.

## COUNSEL FOR ACCUSED

The Sixth Amendment likewise provides that a defendant shall "*have the assistance of counsel for his defense.*" If the defendant be financially unable to employ such assistance, the Court must assign counsel to represent him provided, however, he desires such assistance. Attorneys, being officers of the Court, may not decline such assignments, and must serve without compensation. This provision marked an important step in the world's advancement and obtains in all felony cases regardless of how poor, obscure, or depraved the

defendant may be or how reprehensible his crime. Under the common law a prisoner was not allowed counsel, and such right was not granted in England in all cases until 1836. The United States was the first among the nations not only to permit every person accused of crime and tried before a court, to have counsel, but to furnish counsel for every person who is financially unable to employ such assistance. This right, moreover, includes the privilege of consulting with counsel out of the presence or hearing of any officer or other person.

#### ACCUSED AS WITNESS

Another departure from the early rule is found in that provision of the Fifth Amendment which provides that no person shall be "*compelled in any criminal case to be a witness against himself.*" To understand the value of this guaranty, we have but to recall the tortures that were once inflicted upon one accused of crime to compel his confession. This provision not only protects the prisoner in the court room during his trial, but throws the mantle of its security around him the moment of his arrest. Any statement or confession, therefore, which is extorted from an accused by the flattery of hope or the torture of fear may not be used in evidence against him. Any such statement or confession to be admissible against an accused must be freely and voluntarily made; that is, made without any inducement of a worldly or temporal character in the nature of a threat or promise of benefit held out to him by one whose duty it is to apprehend, examine, or prosecute him. This guaranty applies equally to one's books and papers which may not be seized in his office or on his premises without legal authority and used against him in a crim-

inal prosecution. But papers taken from the person of an accused after his arrest may be admitted in evidence against him without violating this constitutional guaranty. A defendant, however, may always testify in his own behalf.

#### FORMER JEOPARDY

A still further guaranty is provided in the Fifth Amendment wherein it is stated that no person shall "*be subject for the same offense to be twice put in jeopardy.*" "A person is in jeopardy", says Cooley, "when he is put upon trial before a court of competent jurisdiction, upon an indictment or information which is sufficient in form and substance to sustain a conviction, \* \* \* and a jury has been empaneled and sworn to try him." If the accused is acquitted or the trial is stopped because of insufficient evidence, he cannot be tried again. However, if the jury fails to agree upon a verdict, or the conviction has been reversed by a higher court, the accused has not been "put in jeopardy", within the meaning of the Constitution. Citizens of this country are, however, living under a dual sovereignty—the State and the Nation—and the courts of each have jurisdiction within their respective spheres. Former jeopardy, therefore, does not arise in offenses which are indictable in both the State and United States Courts, and an acquittal in one court is no bar to a trial in another.

#### FINALITY OF JURY'S VERDICT

Not the least of our constitutional guaranties is that found in the Seventh Amendment, which provides that "*no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the*

*rules of the common law.*" The rules of the common law in both civil and criminal cases are: First, the court which tried the case may set aside a verdict of "guilty", and grant a new trial before another jury; second, the higher or appellate court may reverse the case on appeal for some error committed by the trial court and send the case back to be tried again. In neither case, however, may the court determine the facts. Such is within the exclusive province of the jury. A verdict of "not guilty" by a jury is final, and may not be set aside or questioned by the trial court, nor is there any appeal therefrom. The court, however, may direct the jury to return a verdict of "not guilty", or it may set aside a verdict of "guilty"; but the Court cannot instruct the jury to return a verdict of "guilty."

#### SEARCHES AND SEIZURES

The English custom of searching at will the person, house, or place of business of any suspected person for evidence of his guilt, sometimes of destroying evidence in his favor, was condemned and feared by the colonists. Therefore, they added the Fourth Amendment to the Constitution, which reads: "*The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*"

As long as crimes are committed, or loot hidden, search warrants will remain an important and necessary instrument in the detection, apprehension and prosecution of criminals. Such writs are designed for the pro-



tection of both the Government and the people. When resorted to by the Federal authorities, however, such warrants must be issued and executed in conformity with the above quoted Fourth Amendment; and, since all the States have written a similar provision into their respective constitutions, such requirements must likewise be observed by State authorities.

Under this Amendment no premises may be lawfully searched except upon a valid warrant; that is, a warrant which complies in every particular with the constitutional requirements. Otherwise, such warrant is void, the officer executing it is a trespasser, and all evidence secured under it, no matter how conclusive of the guilt of the accused, is inadmissible in evidence against him.

The requisites of a valid search warrant are: (1) the search authorized must not be "unreasonable", and to be reasonable it must in all respects comply with the requirements of the Constitution; (2) the warrant must have been issued upon "probable cause", that is, the person swearing out the warrant (making the complaint) must have a reasonable ground of suspicion, supported by circumstances sufficiently strong to cause a cautious man to believe the accused guilty; (3) the complaint must be in writing and must state the present existence of facts justifying the issuance of such warrant; (4) the complaint or statement of facts must be supported by the "*oath or affirmation*" of the complainant; (5) the warrant must describe with certainty "*the place to be searched, and the persons or things to be seized.*"

It is apparent, therefore, that a search warrant may not be signed in "blank" by the issuing official and left to be filled in by the executing officer. Likewise an "ex-

ploratory" search warrant, that is, a warrant for the indiscriminate search of houses, buildings, etc., to ascertain whether the law is being violated therein, is issued without "*probable cause*" and is therefore void. Moreover, in the execution of a valid search warrant no other premises may be searched, or "*persons or things*" seized than those "*particularly*" described therein.

The guaranties of this Amendment also extend to one's person, books, and papers, wherever they may be, which have been seized under an illegal search warrant or in violation of the Fourth Amendment, which exempts a person from being compelled to be a witness against himself. Such books and papers thus illegally seized are not admissible in evidence against the accused and must be returned to him. Moreover, in *Silverthorne v. United States*, 251 U. S. 385, the Supreme Court held that the information gained by such illegal seizure cannot be used to support a later civil demand by the Government.

#### SUMMARY

Under these guaranties in our Constitution, no person may be tried for an offense until he is duly indicted by a grand jury; he is entitled to reasonable bail (except in capital cases) both before trial and pending appeal; he must be informed of the nature and cause of the accusation against him; unless he enters a plea of guilty, the accused must be tried by a jury in the State and district wherein his offense was committed; his trial must be both speedy and public; he must be confronted by the witnesses against him; the Court must compel witnesses in his behalf to appear and testify; if the accused desires legal assistance and is financially unable to obtain it, the

Court must assign counsel to represent him; he may also testify in his own behalf, but may not be compelled to give evidence; he may not be twice put in jeopardy for the same offense; a verdict of *not guilty* by the jury is final; and an accused is secure in his person, home, papers, and effects, against *unreasonable* searches and seizures.

## CHAPTER X

### GUARANTIES IN CIVIL CASES

*Patriotism calls for the faithful performance of all the duties of citizenship in small matters as well as great, at home as well as on the tented fields.*

WILLIAM J. BRYAN.

**W**HILE the constitutional guaranties in civil cases are fewer in number than those relating to criminal procedure, they are no less important. In fact, it may be said that our unprecedented commercial and industrial development as a Nation is directly traceable to these constitutional provisions.

#### IMPAIRMENT OF THE OBLIGATION OF CONTRACTS

The first in importance among these guaranties is found in Section 10, Article I, of the Constitution, which provides that "*no State shall \* \* \* pass any \* \* \* law impairing the Obligation of Contracts.*" This provision excited no debate in the Convention, hence its origin is uncertain. Its incorporation in our fundamental law, however, was probably due to the experience of many of the delegates in their respective States. At that time it was not only the usual practice for the States to repudiate their own contracts, but many of them had passed laws which enabled individuals to do likewise. Some of the States also had enacted statutes suspending the right of creditors to collect their claims, while others had authorized debtors to settle their debts by the delivery either of land or personal property to their creditors. As a result, business was paralyzed and credit everywhere destroyed.

The immediate result of this constitutional inhibition preventing the States from enacting any law impairing the obligation of contracts was to infuse in business generally a high degree of confidence in the integrity of the Nation; to stabilize commercial transactions; and to bring order out of chaos and confusion. In fact, it may be said that no clause of our fundamental law has touched so widely the more important affairs of our domestic life, or has been the subject of more extensive interpretation and application by the courts than this one. The "*contracts*" protected by this provision are agreements between parties to do or not to do a particular thing, and apply only to such contracts as relate to property or other things of value. They embrace undertakings between States, between a State and the United States, States and individuals, States and corporations, corporations and individuals, corporations and corporations, and between individuals. The "*obligation*" referred to is the law in force at the time and at the place where the contract is made, and requires the parties to perform what they agree to do. At the time the contract is made all existing law which in any wise affects its validity, construction, discharge, or enforcement, enters into and becomes a part of it. In a word, this constitutional provision means that a contract which is lawful at the time it is entered into cannot be rendered void or impaired in the slightest degree by any subsequent change or repeal of the law by the State or any of its political sub-divisions obligated therein.

Another important guaranty relating to business undertakings, is the "Due Process Clause" found in the Fifth and Fourteenth Amendments. These provide that neither the Federal nor State Governments shall

deprive any person of his property "*without due process of law.*" Such provisions likewise protect the individual against any infringement by either Federal or State authority upon his freedom to make all lawful contracts.

It is these constitutional guaranties relating to contracts that enable States, counties, districts, and municipalities to finance the construction of roads, schools, and other public improvements from the sale of bonds, which are contracts within the meaning of the Constitution. The fact that such contracts may not be subsequently repudiated or impaired by the issuing bodies gives that degree of confidence to investors which results in a ready market for such securities.

#### PRIVILEGES AND IMMUNITIES

One of the most valuable civil guaranties is found in Section 2, Article IV, of the Constitution, which provides that "*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*" This clause restrains a State from legislating in any manner that will discriminate in favor of its own citizens and against those of other States. The Articles of Confederation contained a similar provision, but there was no central authority to enforce it, and persons going from one State to another frequently found themselves victims of unjust discrimination. It was the usual practice for each State to legislate in favor of its own citizens, and individuals from other States were looked upon and treated as aliens.

It was the purpose of this provision to put an end to all such discrimination, and open the door of American opportunity in each State to the citizens of every other

State. The Federal Courts created by the Constitution are always on guard to correct any infringement by the States upon this or any other constitutional guaranty. No State may now legislate so as to favor its own citizens over those of another State. There are numerous instances where such legislation has been attempted, but all such statutes have been held unconstitutional and void, and the Federal Courts are zealously watchful against any infringement upon this constitutional guaranty. In *Corfield v. Coryell*, 4 Wash. C. C. Rep. 371, the Court said: "The right of a citizen of one state to pass through, or to reside in, any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of *habeas corpus*; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the description."

The second sentence of the first section of the Fourteenth Amendment further strengthens the uniformity of these "privileges and immunities" of all citizens, by providing that "*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.*" When read together these two clauses simply mean that the States are forbidden to abridge the "privileges and immunities" of (1) the citizens of another State, and (2) the citizens of the United States. These restrictions, however, have no reference to individuals, and any abridgement of the "privileges and immunities" of a citizen by an

individual must be dealt with by the State in the exercise of its police powers, and not by the Federal Government.

### EQUAL PROTECTION OF THE LAWS

The "Privileges and Immunities" guaranty is also made more effective by the last clause of Section 1 of the Fourteenth Amendment, which inhibits the States from denying "*to any person within its jurisdiction the equal protection of the laws.*" While this provision was designed primarily for the protection of the newly liberated slaves, it includes within its purview "any person", citizen, alien, or corporation, who may be inequitably affected by State laws. It is a restriction upon the States and their instrumentalities—legislative, executive, and judicial. It does not, however, prevent reasonable classification of persons where all within the same class are treated alike. Under like circumstances, property and incomes may be similarly classified. Thus State laws providing separate railway coaches for white and colored passengers are constitutional, where the accommodations are equal, and inheritance, income, and gross sales taxes may be graduated according to size of the estate, amount of income, or total volume of sales.

This inhibition likewise applies only to States, and has no reference to individuals who may deprive others of the equal protection sought to be assured by this provision. Individuals who violate the law in this respect must be dealt with by the State wherein the offense is committed.

### PRIVATE OWNERSHIP OF PROPERTY

Our constitutional guaranties respecting the private



ownership of property and our custom of excluding the government from unnecessarily competing in business with its citizens are the foundations upon which rests the greatness of America. These guaranties are found in the Fifth and Fourteenth Amendments. The first, which is a limitation on the powers of the Federal Government, provides that "*no person shall be \* \* \* deprived of \* \* \* property without due process of law.*" It is supplemented by the second, which is a like limitation on the authority of the States, and reads: "*No State shall make or enforce any law which shall \* \* \* deprive any person of \* \* \* property without due process of law.*"

It is this principle of private ownership of property constitutionally protected that inspires inventive genius, develops individuality and initiative, and cultivates those virtues of thrift and frugality that have made America great. It is these guaranties that are particularly objectionable to the Bolsheviki, and also to a few political charlatans slightly less radical. They advocate the present Russian system of social organization in which all property is owned by the State and held in common for all the people. It is the opposite of the American system of private ownership.

Both of these radical elements may be classed among that small minority who have nothing and insist on dividing it with everybody else. They seem unable or unwilling to comprehend that the very genius of America is our individualism—our individual right to the exclusive ownership of property honestly acquired. This system may not be perfect, but, multiply its evils as we may, it remains true that we have produced more wealth, invented more tools, opened more mines, con-

quered more forests, distributed more comforts, conveniences and arts in this Republic alone in the last fifty years than the rest of the entire world from the year one to the year 1800. Whenever, either by law or by force, we deprive the individual of the right to enjoy the fruits of his own labor, whether of hand or brain, we take from him that initiative that has elevated America to a place of supreme leadership among the nations of the world. American individualism seeks to lift all who are on the lower planes of life up to the level of the highest, while communism is a mowing machine which snips off the heads of the superior and reduces all to the level of the lowest.

#### DUE PROCESS OF LAW

The Fifth and Fourteenth Amendments established another important guaranty. The Fifth declares that "*no person shall be \* \* \* deprived of life, liberty or property without due process of law.*" This provision owes its origin to the *Magna Charta*, and is a restriction upon the powers of the Federal Government only. The Fourteenth Amendment, however, by use of identical language, lays a like inhibition upon the States. Its prohibition applies to all the instrumentalities of the States—legislative, executive, and judicial—and also to municipalities, which are creatures of the States. As said in *United States v. Powers*, 151 Fed., 648, "No right, privilege, or immunity in respect to '*due process*' \* \* \* arises under the XIV Amendment unless there be a denial of the right by the State or its officers." It has no application to infringement by individuals. The same or a similar provision, however, has been incorporated into the constitution of

every State, hence the citizen has a double security in the enjoyment of this guaranty.

The Constitution does not define the term "*due process of law*", nor is any power conferred upon Congress to define it by legislative enactment. It is likewise the settled rule of the courts not to form a general definition of the term, but to deal with each case separately upon its own facts. As was said by the Supreme Court in *Ballard v. Hunter*, 204 U. S. 241, this phrase "has never been defined." Mr. Cooley in his *Constitutional Limitations*, page 441, however, defines it as follows: "Due process in each particular case means such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." In *Ex Parte Young*, 209 U. S. 123, the Supreme Court said that "*due process of law*" means that "no change in ancient procedure can be made which disregards those fundamental principles \* \* \* which \* \* \* protect the citizen in his private right and guard him against the arbitrary action of the government." It has also been held to mean a regular course of judicial proceedings in which due notice is given of the claim or accusation asserted and an opportunity to defend it through the courts according to the Constitution and the laws of the land.

#### EMINENT DOMAIN

Closely related to the "*due process*" provision is the last clause of the Fifth Amendment which provides that "*private property*" shall not "*be taken for public use, without just compensation.*" This guaranty is of an-

cient origin and, while the framers of our Constitution took it from the *Magna Charta*, it probably dates back to the Roman law. Both before and since Ahab and his Zidonian queen put Naboth to death and seized his property, like avaricious and greedy kings have seized and appropriated the possessions of their subjects. The framers of the Constitution knew that governments are all powerful, so they included this clause in our fundamental law, and it has become one of our most treasured guaranties. The Amendment does not define "property", nor may Congress define it, the definition being left to the States subject to the restrictions found in the Thirteenth Amendment that property in man shall not exist. This clause is a limitation upon the authority of the Federal Government only, but the "*due process*" clause of the Fourteenth Amendment places a like limitation upon the powers of the States. All of the States, moreover, have written the same guaranty into their State constitutions which is an additional safeguard against encroachments upon the private property of the people.

It must not be understood, however, that private property may not be taken for public use. The public must be adequately served and whenever private property stands in the way of that service, it can and will be taken for the public good but, always and everywhere, adequate compensation must be paid to the owner of such property.

The most celebrated case involving this principle is *Lee v. United States*, 106 U. S. 196 (1882). Acting under an Act of Congress (1862) for collecting taxes "in the insurrectionary districts", the Federal Government seized and purchased at a tax sale the estate of

General Robert E. Lee, known as Arlington. Upon the orders of President Lincoln a fort was erected and Arlington Cemetery located upon the property. Twenty years later Lee's heirs brought suit in the Federal Court to recover the property. Having lost in the lower court, the Government carried the case to the Supreme Court which held the tax sale void and the President without authority to make any disposition of the property. "Not only no such power is given," (in the Constitution) said the Court, "but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.

\* \* \* Shall it be said that the Courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without any process of law and without compensation, because the President has ordered it and his officers are in possession? \* \* \* No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity." The Government acquired the estate later by paying adequate compensation.

#### JURY TRIAL IN CIVIL CASES

On September 12, 1787, the Constitutional Convention rejected a motion made by Williamson, of North Carolina, to include a provision for trial by jury in civil cases. The Seventh Amendment, however, provides that "*In all suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.*" The term "common

law", as used in the United States (except in Louisiana), means the common law of England and the statutes passed by the English Parliament which were in force at the beginning of our Revolution. Suits at common law included those rights and remedies peculiarly legal in their nature and such as it was proper to ascertain by appropriate methods and proceedings before courts of law when the Constitution was written. They may be said to include all suits except those in chancery or equity, admiralty and maritime jurisprudence. The Federal Courts, however, may not entertain a suit in equity when there is a complete remedy at law. The jury guaranteed in civil cases is the same as in criminal cases—twelve men, and their verdict must be unanimous. But such jury may be waived (in civil cases only) by agreement of the parties, and all questions of law and fact submitted to the Court for a decision.

This Amendment, however, is not binding upon the States. Hence, it is within the police power of the States to legislate respecting jury trials in State courts in any manner not in conflict with their State constitutions.

#### FINALITY OF JURY'S VERDICT IN CIVIL CASES

The Seventh Amendment further provides that "*no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rule of the common law.*" These rules are given elsewhere in "Finality of Jury's Verdict in Criminal Cases." They are the same in both cases, except that in civil cases the Court retains absolute control over the jury's verdict.

## APPEALS FROM STATE COURTS

Whenever in a State court a right is claimed on either side arising under the Constitution or laws of the United States, or any treaty with a foreign government, and the right so claimed is denied upon appeal to the highest court in the State, the cause, so far as that question is concerned, may be appealed to the Supreme Court of the United States for review. No other point, however, will be considered by that Court. Moreover, if the question does not distinctly arise, or is not necessary to be decided in reaching a proper judgment, the appeal will not be entertained.

## SUMMARY

The Constitution insures the civil rights of the people against infringement by the States by proclaiming the sacredness of all lawful contracts; by establishing an equality among the citizens of the several States with respect to their privileges and immunities; by guaranteeing to all persons the equal protection of the laws; by protecting all persons in the ownership of property; by providing for an appeal in certain cases from the highest State court to the Supreme Court of the United States.

## CHAPTER XI

### POLITICAL GUARANTIES

*Laws exist in vain for those who do not have the courage and the means to defend them.*

THOMAS B. MACAULEY.

OF EQUAL importance are those guaranties in the Constitution which relate to the political rights of both States and citizens. It is probable that no question before the Constitutional Convention occasioned such deep concern, or caused more prolonged and earnest discussion than the political relations between the States and the National Government. It is likewise true that the chief element of strength in our democracy is the nicety of balance established between these two sovereignties—a balance which establishes the sovereignty of the National Government in its own sphere, and at the same time acknowledges the sovereignty of the several States in theirs.

#### STATES GUARANTEED A REPUBLICAN FORM OF GOVERNMENT

Foremost among the political guaranties of our Constitution is found in Section 4, Article IV, which provides that "*The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and on application of the Legislatures or of the Executive (when the Legislature cannot be convened) against domestic Violence.*"

By a Republican Form of Government the framers of the Constitution meant "a government in which not



only would the people's representatives make the laws and their agents administer them, but the people would also directly or indirectly choose the executive." The people of the several States have enjoyed this form of government since the birth of our Nation, and under this guaranty they will be protected in the enjoyment thereof so long as we continue our existence under the Constitution.

Happily, the Federal Government has seldom been called upon to protect a State against invasion. A few times, however, States have been compelled to call upon the National organization to protect them against domestic violence. The last occasion was in 1921, when labor troubles in West Virginia reached the proportions of an insurrection which was beyond the control of the State. At the request of the Governor, Federal troops were sent into the affected area and order was quickly restored.

In 1894, during a Nation-wide railroad strike, against the wishes and over the protest of John P. Altgeld, Governor of the State, the President sent Federal troops into Illinois to restore and maintain law and order. This was done, however, under the authority of Section 8, Article I, of the Constitution, which provides that "*The Congress shall have Power \* \* \* to establish Post offices and post Roads.*" The President acted on the theory that since the railroads carried the mails, it was his duty to keep such post roads open.

The Federal Government, however, is not a policeman, and it is not required to respond to every request that may be made by State legislatures or State executives for assistance. The President alone may determine when "*domestic violence*" in a State is of such nature as to justify Federal interference.

## POWERS RESERVED TO THE STATES

The average student of our Constitution gives but little attention to the Ninth and Tenth Amendments, yet they are of the utmost importance. Both were the outgrowth of fear—fear that the National organization might attempt to exercise powers which had not been granted it by the Constitution. The Tenth, which is the more important of the two, reads: "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*"

Prior to the adoption of the Constitution the States possessed all the powers which are inherent in sovereign nations. By the acceptance of that instrument, however, they surrendered certain of these powers to the Federal Government. The powers so surrendered are clearly and distinctly enumerated in Section 8, Article I, of our fundamental law. To the last paragraph of this section there was added a qualifying clause which also surrendered to the National Government the right "*To make all Laws which shall be necessary and proper for carrying into Execution*" the specific powers thus surrendered by the States. Then, as a further restriction on the authority of the National Government the Ninth Amendment provides that "*The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*"

In Section 10, of Article I, of the Constitution, the States are prohibited from exercising certain powers, which are also distinctly enumerated. It is apparent, therefore, that the States or the people retain the exclusive right to exercise all powers not granted to the Federal organization nor prohibited to them by the

Constitution. It was impossible to enumerate in the Constitution all the powers retained by the States or the people. With reference to these retained powers, the Supreme Court, in *Chicago, etc. v. McGuire*, 219 U. S. 549, said: "Among the powers of the State not surrendered—which power therefore remains with the State—is the power to so regulate the relative rights and duties of all within its jurisdiction as to guard the public morals, the public safety, and the public health, as well as to promote the public convenience and the common good." In addition, the States have exclusive authority to legislate on all questions respecting civil and religious liberty, contracts, agency, master and servant, utility regulations, education, suffrage, marriage and divorce, business, property, trade, taxation, and the administration of most of the criminal laws, and on any other matter which comes within the "police powers" of the States.

#### INTEGRITY OF THE STATES

While Section 3, Article IV, of the Constitution, provides that "*New States may be admitted by the Congress into the Union,*" it also secures the future political integrity of all States, both new and old, by further providing that "*no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.*"

In this respect the State of Texas occupies a position different from any of the other States. On April 12, 1844, the United States negotiated a treaty with the former Republic of Texas under which it was to be ad-

mitted as a State. The treaty was rejected by the Senate the following June because the northern Senators feared the extension of slavery. It became a burning issue in the political campaign of 1844, and the advocates of admission won. On March 1, 1845, a Joint Resolution was passed by Congress which embraced the main provisions of the former treaty. It was approved by a convention in Texas July 4, 1845, and on that day Texas became one of the States of the Union. This Resolution provided that "new States of convenient size not exceeding four in number, in addition to the State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the Federal Constitution."

#### PROTECTION OF SMALLER STATES

No question before the Constitutional Convention caused greater anxiety than the fear of the larger States felt by the smaller ones. In fact, it was the disturbing factor that more than once threatened the success of the undertaking. But the "Connecticut Compromise" suggested by Roger Sherman gave the smaller States ample protection by writing Section 3 of Article I, into the Constitution, which provides that "*The Senate of the United States shall be composed of two Senators from each State, \* \* \* and each Senator shall have one vote.*" Then, to safeguard this equality against the possibility of change by future amendments, the last clause of Article V, was written into our fundamental law which provides "*that no State, without its Consent, shall be deprived of its equal suffrage in the Senate.*"

## NO PREFERENCE SHALL BE GIVEN STATES

Further to safeguard the absolute equality of all States of the Federal Union, the framers of the Constitution in Section 9, Article I, declared that "*No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay Duties in another.*" This equality among the States is still further emphasized by the first paragraph of Section 8, Article I, which provides that duties, imposts and excises levied and collected by the Federal Government "*shall be uniform throughout the United States.*"

## IMPEACHMENT OF OFFICERS

Further to safeguard the rights of the people against the abuses which might result from the election or appointment of corrupt officials, Section 4, Article II, of the Constitution, provides that "*The President, Vice-President and all civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of Treason, Bribery, or other high Crimes and Misdemeanors.*" Under the provisions of Section 2, Article II, the pardoning power of the President does not extend to "*cases of impeachment.*"

Section 2, Article I, places "*the sole power of impeachment*" in the House of Representatives by a numerical majority, while Section 3 of the same Article gives to the Senate "*the sole power to try all impeachments.*" In all such cases the Senate sits as a court, organizing anew, the Senators taking a special oath or affirmation applicable to the proceedings. A two-thirds

vote is necessary to convict, and from their decision there is no appeal. When the President is thus tried, the Chief Justice of the Supreme Court presides, but has no vote. His duties are to pass upon the admissibility of the evidence offered. In all cases of impeachment the punishment is limited by Section 3, Article I, (1) to removal from office; (2) to disqualification from holding and enjoying any "*office of honor, trust, or profit under the United States*"; but criminal prosecution may follow in the proper courts according to law.

Only nine times has this constitutional power of impeachment been resorted to in Federal cases: (1) William Blount, United States Senator from Tennessee, for conspiring to transfer New Orleans from Spain to England, 1797-98, acquitted. (2) John Pickering, Judge of United States District Court of New Hampshire, charged with drunkenness and profanity, convicted and removed, 1803. (3) Associate Justice Samuel Chase, acquitted, 1804. (4) James H. Peck, United States District Judge of Missouri, acquitted, 1830. (5) West H. Humphreys, United States District Judge of Tennessee, convicted of rebellion, 1862. (6) Andrew Johnson, President, acquitted, 1868. (7) W. W. Belknap, Secretary of War, for receiving money from post traders with Indians, resigned, acquitted thereafter for want of jurisdiction, 1876. (8) Charles Swayne, Judge United States District Court of Florida, misconduct in office, acquitted, 1905. (9) Robert W. Archibald, Judge of United States Circuit Court of Pennsylvania, for corruption in office, convicted, 1913.

#### CITIZENSHIP

The Fourteenth Amendment provides that "*All per-*

*sons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside,"* while Section 2, Article IV, of the Constitution, further provides that "*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*"

In addition to conferring citizenship upon the Negro, this Amendment likewise extends citizenship to *all* persons born in the United States which, of course, includes all Chinese, Japanese, Hindus and other nationalities born in this country, but who are otherwise not entitled to citizenship under our naturalization laws.

#### THE RIGHTS OF SUFFRAGE

In a free Republic the highest political right as well as the most important civic duty of the citizen lies in his free access to the ballot box and his willingness to share in its responsibilities. This right, however, was only halfway guaranteed by the Fifteenth Amendment which provides that "*The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.*" This Amendment was added to our Constitution in 1870, and it took exactly fifty years to enfranchise the other fifty per cent of our people by adding the Nineteenth Amendment to our fundamental law which provides that "*The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.*"

#### SUMMARY

The Constitution is the binding obligation of the

Federal Government that it will maintain a republican form of government in all the States of the Union and protect each of them against invasion and domestic violence; that it will protect each of the States in the exercise of all the powers reserved to them by the Constitution; that it will protect and preserve the political and territorial integrity of all the States; that no State shall receive or maintain a preference over another State; that all persons born or naturalized in the United States shall be protected in the complete exercise and enjoyment of their citizenship; and that officers who violate the provisions of the Constitution may be impeached and removed from office.



## CHAPTER XII

### EARLY JUDICIAL GROWTH OF THE CONSTITUTION

*It is indispensable to the happiness of the individual States that there should be lodged somewhere a supreme power to regulate and govern the general concerns of the confederated republic without which the Union cannot be of long duration.*

GEORGE WASHINGTON.

**I**T WAS necessary that our Constitution be a written instrument. With the successful termination of the Revolution each of the Thirteen Colonies became independent States. They could individually make war and peace, send ambassadors to other countries, negotiate treaties, raise an army or build a navy. In a word, they possessed all the sovereignty of independent nations. This sovereignty had been acquired at frightful cost and was jealously guarded. For these small but independent nations to unite into one central government it was necessary for them to surrender to such government some of their own governmental powers. To obviate, as far as humanly possible, any future controversy as to what powers were thus surrendered, as well as to define the rights retained by the people, and, therefore, denied to both the States and the National Government, it was necessary that the agreement be clearly stated in writing. This tripartite written Agreement between the Federal Government, the State Governments, and the people, together with the Amendments thereto, we call the Constitution of the United States.

Whatever the original merit of the Constitution, the Government that has been established upon that document as its foundation is far less a creation than a growth. In fact, it may be said that the highest excellence of our fundamental law lies in its capacity for expansion, for it has become what it is through judicial growth, that is, through the construction and application that has been given to its provisions by the Supreme Court. The wisdom that framed it would have availed nothing in the absence of the vision that applied it so skilfully to the necessities of the people.

While the Constitution is a model for clearness of statement and conciseness of expression, yet, as said by Webster, "no definition can be so clear as to avoid the possibility of doubt; no limitation so precise as to exclude all uncertainty." This aphorism probably accounts for the wide divergence of opinion which prevailed during much of our early history as to the meaning and intent of many clauses in our fundamental law—a difference which was so pronounced at times as to threaten the very existence of the new Union.

When the Constitution was once adopted it was but natural that men should read into it different meanings according to their prejudices or honestly reasoned convictions. Those who had opposed its adoption favored such a strict construction of its provisions as would confine the powers of the Federal Government to the narrowest range possible. On the other hand, its sponsors favored such a broad construction of its powers as would dwarf the State into a position of insignificance. The most serious controversy, perhaps, was over the construction to be given the Constitution with respect to its first clause, and its closing sentence. It begins, "*We,*

*the people of the United States*", a clause which Patrick Henry vigorously denounced. On the last day of the Convention on motion of Benjamin Franklin the concluding sentence, "*Done in convention by the unanimous consent of the States present*", was added without objection. Though there is nothing inconsistent in these two phrases, each became the shibboleth of two great schools of political thought and the battle cry of two different political parties. One side, looking only at the opening clause, asserted that the people as a whole were bound by the Constitution; the other, considering the last sentence only, as stoutly maintained that it was only a league between the several States. Both constructions were wrong, for the Constitution is equally binding upon both the people and the States.

Upon the Supreme Court, a tribunal created by the Constitution, fell the burden not only of composing these disturbing differences and striking that golden mean of interpretation which left both the National and State Governments supreme within their respective spheres, but also of applying the principles of the new and untried Constitution to the growing needs of the young and evolving democracy. At the head of the Court during these critical years was Chief Justice John Marshall—"The Constructive Architect of American Nationalism." Under his guiding hand, as said by James Bryce, "the Constitution seemed not so much to rise \* \* \* to its full stature as to be gradually unveiled by him, till it stood revealed in the harmonious perfection of the form which its framers had intended."

Marshall was appointed Chief Justice by President Adams in 1801, six weeks before the inauguration of Jefferson as President. He served until his death in

1835. Prior to his appointment the Supreme Court had decided only six cases which involved constitutional questions. It may be said, therefore, that the field opened to Marshall and his associates on the Court, in the construction and adaptation of the Constitution to American life, was untrodden, and his advent marked the beginning of the development of constitutional law by judicial decision, a phase of our judicial procedure which is still in progress and must continue as long as our Government retains the essential features with which it was endowed.

No judicial tribunal in the history of the world has faced the perplexing problems that confronted our Supreme Court under Marshall. Courts are usually concerned with the administration of individual justice under rules of established precedents. The Constitution being new, there were no precedents by which the early Court could be guided. It had to make precedents, not follow them; it had to deduce the intent and purposes of the Constitution from general principles, considering its great purposes and far-reaching consequences. In addition, the Court had to concern itself with the principles and powers of the Federal Government and its various departments; to determine the authority of the States and their relations to the National Government; to adjust the strained relations existing between States; to define the extent and quality of the protection afforded by the Constitution to personal and political rights; and to fix the limits of Federal judicial jurisdiction. To these and many other problems of lesser importance the Supreme Court, under Marshall's guidance, found a permanent and satisfactory solution.

In the light of subsequent events the appointment of

Marshall seems highly providential. If he had declined, as he had declined a position on the Court a few years earlier, and a weak man had succeeded to the position, it is probable that the consequences would have been disastrous. First of all, Marshall was a sincere patriot; second, as a statesman he was the peer of the world's greatest and most accomplished; third, in temperament he was highly judicial; in character dignified and blameless; in perception unerring; in reasoning luminous; fourth, his opportunities for understanding the Constitution were superior, perhaps, to those of any other man of his time. For years he had heard its provisions and objects discussed from every possible angle by men of extraordinary talents; while in the celebrated Virginia convention he had been conspicuous among its defenders. Lastly, it has been said that "he had a genius for the law as distinct as that of Napoleon for war." Of him William Pinkney, America's greatest lawyer of his time, said: "He was born to be chief justice of whatever country his lot might happen to be cast in."

We should not, however, overlook the high attainments of Marshall's associates on the Court. Three of them had been members of the Convention which drafted the Constitution; another, for a number of years, was Justice Story, one of the most learned of American lawyers. But theirs is the testimony that, in the field of constitutional law, Marshall was conspicuously preeminent. Through the application of the great principles stated by him the Constitution has been able more fully to meet the demands of a growing Nation and more adequately to protect and to serve the changing necessities of the American people. If others conceived our form of government, it was Marshall who gave precision to

its meaning and translated it from an abstract theory into a practical force suited to the varied exigencies of our National life.

Notwithstanding his great service to his country Marshall's entire official life was deeply embittered by the popular hostility toward most of his judicial utterances. In fact, it may be said that only once did he render a truly popular opinion. This was in *Gibbons v. Ogden*, which broke the power of the "steamboat monopoly". Living in tumultuous times, Marshall, throughout his entire judicial career, was mercilessly censured, maligned, and excoriated by both the press and the public. In fact, no man in our history has ever been subjected to the scurrilous abuse that was for years heaped upon him, and no man deserved it less. In the performance of his duty, however, he was indifferent alike to praise or blame.

Time, with its silent but inexorable logic, has written history's verdict and placed John Marshall among the world's foremost jurists. His name and fame as "The Great Expounder of the Constitution" are now cherished, irrespective of section or party, as the common heritage of a great and free people.

It is the purpose of this chapter briefly to review a few of the early decisions of the Supreme Court which not only made America, but established fundamental principles and set up landmarks to be followed by those who were to come later. The review includes seven opinions rendered by Chief Justice Marshall and one by Justice Story. In order that the reader may have a more comprehensive grasp of the constitutional principles enounced by these decisions, they are considered somewhat in relation to their historical and political

background and are grouped as they deal with the same great constitutional questions, rather than in their chronological order.

#### POWER OF THE SUPREME COURT TO HOLD ACTS OF CONGRESS UNCONSTITUTIONAL

The authority exercised by the Supreme Court to determine the constitutionality of Acts of Congress is neither conferred upon that tribunal by the Constitution in express terms nor given by any statute. It was established by decisions of the Court itself as a necessary *implied power* in order to make the Constitution the "*supreme law of the land*." The question was definitely settled by Chief Justice Marshall in the celebrated case of *Marbury v. Madison*, 1 Cranch, 152, decided in 1803. This case is also important because the breach it created between the Executive and Judicial branches of the Government had a profound effect upon our early history.

#### **Marbury v. Madison, 1 Cranch, 152.**

In the closing hours of his administration, President Adams appointed one William Marbury, a Federalist, as one of the justices of the peace for the District of Columbia. The appointment was confirmed by the Senate, the commission signed by the President, but not delivered to the appointee. Upon assuming office, President Jefferson ordered it withheld. Marbury applied to the Supreme Court and was awarded a Rule against James Madison, Secretary of State, requiring him to appear and show cause why a *mandamus* should not be issued to compel the delivery of such commission. This action of the Court was deeply resented by the

President and his friends as an attempt by the Judiciary to interfere with the prerogatives of the Executive.

The grant of original powers to the Supreme Court, Section 2, Article III, of the Constitution, does not confer upon that tribunal the authority to issue writs of *mandamus*. The last sub-section of section 13 of the Judiciary Act, enacted by the First Congress in 1789, however, attempted to confer upon the Court the authority "to issue writs of mandamus \* \* \* to any courts appointed or person holding office under the authority of the United States", and it was upon the authority attempted to be conferred by this Act that the Court awarded the Rule.

Upon the hearing Marshall dismissed the Rule and enounced his first great constitutional principle, namely, that the Constitution is the "*supreme law of the land*", binding upon both Congress and the Courts, and that any Act of Congress which is repugnant to that *supreme law* is unconstitutional and void. He further held that since the Constitution in its grant of original powers to the Supreme Court did not include the issuance of writs of *mandamus*, such part of the Judiciary Act as attempted to confer that jurisdiction was unconstitutional and void.

Before deciding the jurisdictional issue, however, Marshall further asserted that a President could not authorize a Secretary of State to omit or decline the performance of those duties enjoined by law; that a commission was only evidence of an appointment, its delivery unnecessary to the validity thereof, and that Marbury had been illegally deprived of his constitutional rights—a wrong which could be remedied in a proper court.



This *dictum* not only further incensed the President and his friends, but created the most bitter hostility toward the Court. The decision became the object of the most acrimonious assault both in and out of Congress — not because the Court had exercised the *implied power* in the Constitution to declare an Act of Congress unconstitutional and void, but because it had enounced the doctrine that a *mandamus* might lie against a member of the Cabinet. In fact, it was a few years before it was discovered that the real import of the decision lay in the fundamental principle therein decided that the Supreme Court possessed the power to determine the constitutionality of Acts of Congress—a doctrine that has never been either abrogated or successfully controverted.

#### THE SUPREME COURT AND THE CONTRACT CLAUSE OF THE CONSTITUTION

Section 10, Article I, of the Constitution, among other things, provides that “*no state shall \* \* \* pass \* \* \* any law impairing the obligation of contracts.*” This provision, commonly known as the “Impairment of the Obligation of Contract Clause”, was inserted in the Constitution toward the end of the Convention upon the suggestion of Rufus King, and the record shows that it was adopted with but little debate. Yet, no clause of our fundamental law has more vitally affected the whole course of our economic history or resulted in a more extensive and far-reaching judicial interpretation of the Constitution. It will be observed, however, that the clause is a limitation on the power of the States only, and in no wise relates to the National Government. Hence, every interpretation of

this clause by the Court brought it into direct conflict with the States. Marshall's greatest and most important decisions interpreting this clause of the Constitution are *Fletcher v. Peck*, 6 Cranch, 87, known as the *Yazoo Land Fraud Case*, decided in 1810; and *Dartmouth College v. Woodward*, 4 Wheaton, 669, decided in 1819.

**Fletcher v. Peck, 6 Cranch, 87.**

In *Marbury v. Madison*, Marshall had asserted the authority of the Court to determine the constitutionality of Acts of Congress. In *Fletcher v. Peck*, he likewise declared the power of the Court to determine the constitutionality of State statutes, thus laying the second stone in our constitutional structure.

The facts in this case are that in 1795 the State of Georgia, by legislative act, granted to four land companies a tract of land in what is now the States of Alabama and Mississippi, containing about 35,000,000 acres, for the sum \$500,000. The consideration was grossly inadequate, and the grant was obtained by the bribery of the legislature. The facts became known and the next legislature (1796) passed an act revoking the sale, publicly burned the former act and expunged all evidence of its passage from the legislative records. The repeal act, however, authorized the repayment to the purchasing companies the amounts which they had paid to the State, if called for within eight months. In the meantime, one of the grantee companies had sold its tract to a New England company which in turn had sold its holdings to numerous investors in several States. The repeal statute deprived these purchasers of their lands, and the adoption of the

Eleventh Amendment to the Constitution in 1798 precluded a suit against the State to test the legality of the rescinding act.

Among other things, Section 2, Article III, of the Constitution, extends the jurisdiction of Federal Courts "*to Controversies \* \* \* between Citizens of different States.*" The defendant Peck, a resident of Massachusetts, sold a part of his Georgia holdings to the plaintiff Fletcher, a resident of New Hampshire, for \$3000. It was charged at the time that the sale was a sham and arranged for the sole purpose of obtaining the diversity of citizenship necessary to give jurisdiction to the Federal Courts. The Court, however, believed the transaction to have been in good faith, else it would not have taken jurisdiction of the case. Fletcher immediately instituted suit against Peck in the Federal Circuit Court of Massachusetts to recover his purchase money on the ground that Georgia's repeal act had deprived Peck of his title to the land prior to his sale to the plaintiff. Peck defended on the ground that Georgia's repeal act was void because it contravened the Constitution of the United States, in that it impaired the obligation created by the grant of the State to the original purchasers which was a contract within the meaning and protection of that instrument. Having lost in the Circuit Court, Peck carried the case to the Supreme Court. While the State of Georgia was not a party to the suit, nevertheless, a decision in favor of Peck would be a decision against that State.

It was in this case that the Supreme Court for the first time held a State statute unconstitutional. Marshall realized the storm which such a holding would arouse not only in Georgia but among the States Rights

advocates everywhere. Therefore, he approached the difficult task with supreme tact and, at the same time unmistakably maintained the dignity and authority of the Court. At the outset of his opinion he stated that "The question whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its high station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." He was also careful to state that it was not the intention of the Court "to speak with disrespect of the legislature of Georgia, or its acts"; that the question was general and was treated as such; that the rescinding act could be supported only on the theory "that a legislature may by its own act divest the vested estate of any man whatever for reasons which shall, by itself, be deemed sufficient."

With true courage and deep vision, Marshall then proceeded to state the law of public contract; held that the words of the Constitution were general, hence contracts of all description were protected by it, including grants made by a State and to which a State is a party; that the legislative grant by the Georgia Legislature was an executed contract which that body was competent to pass; that rights had vested under such con-

tract which a subsequent legislature could not divest; that the Georgia rescinding act was in violation of the *Contract Clause* of the Constitution and, for the first time in this country, gave recognition to the old English maxim that "third persons, without notice, shall not be affected by the fraud of the original parties." He further held that courts are without the constitutional power to inquire into the motives that induce legislators to enact a law; that if such representatives be corrupt, the remedy lies in choosing honest ones.

While every proposition stated by Marshall in his opinion was correct, it deeply aroused the States Rights leaders throughout the country and greatly increased the popular distrust of the Court. Nevertheless, its political and economic effect upon our national life has been incalculable. In the first place, it tremendously strengthened the powers of the Court and prevented the States from destroying the Union by adverse legislation. Second, had the Court invalidated the Georgia statute because of bribery and corruption, it would have subjected every subsequent legislative act in every State in the Union to a review by Federal Courts, which procedure eventually would have destroyed every vestige of State Sovereignty. Third, the permanency which the decision gave to commercial transactions inspired business with that degree of confidence which greatly accelerated the economic development of the Nation.

Marshall's opinion, however, had little or no effect upon the immediate situation, but the controversy was finally settled by Georgia's ceding to the Federal Government its claims to these western lands. Congress, thereupon, appropriated \$5,000,000 to settle the claims

of the purchasers under Georgia's original grant, and the bitter controversy ended. From the territory so ceded the States of Alabama and Mississippi were later created.

**Dartmouth College v. Woodward, 4 Wheaton, 629.**

This is Marshall's greatest and most far-reaching decision touching the subject of contracts. It came nine years after *Fletcher v. Peck* and greatly amplified the principles stated in the earlier case. In fact, no lawsuit in our entire history has so profoundly affected the industrial development of the Nation. Yet, at the time of its decision, it attracted no public or professional interest outside of New Hampshire.

The historical side of the case furnishes an interesting chapter in church missionary work. The school out of which this college grew was founded at Lebanon, Connecticut, by Rev. Eleazer Wheelock for the purpose of educating and Christianizing the Indians. Among his students was one Sampson Occom, an Indian youth who possessed remarkable powers of eloquence. Occom went to England to raise funds to carry on the work and succeeded in raising over \$50,000; Lord Dartmouth, for whom the College was later named, being the largest contributor. To insure permanency, the Royal Governor of New Hampshire, in the name of His Majesty King George III, in 1769, issued to the institution a perpetual corporate charter in the name of Dartmouth College. This charter placed the management of the institution in the hands of a self-perpetuating body of twelve Trustees, with Lord Dartmouth at the head. The same year the College was moved to Hanover, New Hampshire, where it had received a grant of 44,000 acres of land.

It is said that nothing so disturbs the peace of a community as a row in a church, and it was such an episode in the church at Hanover that led to this celebrated litigation. Brother Samuel Haze had a misunderstanding with sister Rachel Murch, and, among other things, he told sister Murch that her "character was as black as hell." The good sister resented such unchristian remarks and a church trial resulted which eventually divided New Hampshire into two hostile religious camps. As an inevitable result the dispute soon involved the College. In 1816 the controversy had reached such proportions that it became a statewide political issue between the Republican and Federalist parties. The former won, electing the Governor and a majority of the legislature. An act was passed which repealed the Royal charter and made the College a state institution under the name of the Dartmouth University. Having lost in the state courts, the old Trustees sought relief in the Supreme Court of the United States.

The only issue in the case was whether the Royal charter issued to the College was a contract within the meaning and protection of the *Contract Clause* of the Constitution. Marshall's affirmative answer and his holding that a "corporation is an artificial being, invisible, intangible, and existing only in contemplation of law", endowed with the attributes of "immortality, and \* \* \* individuality" and clothed with such powers as will best effectuate the purposes of its creation, are now as deeply imbedded in our jurisprudence as is the Constitution itself.

Marshall held the charter to be a contract between the donors and Trustees on the one side and the Crown on the other; that New Hampshire had succeeded to all the rights and obligations of the Crown; that "all

contracts and rights respecting property remained unchanged by the revolution"; that the parties to such contract had a vested beneficial interest therein which was protected by the *Contract Clause* of the Constitution; that such contract was impaired by the act of the New Hampshire legislature and, therefore, such act was unconstitutional and void.

This decision likewise had a far-reaching economic and political effect upon the history of the country. From an economic standpoint it formed an impregnable defense of contract rights against the assaults of both State legislatures and courts. It gave a permanency to corporations which immediately began to spring up everywhere in response to business needs. It likewise inspired that confidence in corporate securities which made possible the great industrial and commercial growth of America. From a political viewpoint the decision was no less important. In his "Historical and Literary Essays" Fisk says that this decision "went further, perhaps, than any other in our history toward limiting State sovereignty and extending the Federal jurisdiction." This being true, it is a significant fact that the opinion was concurred in by five Judges, two of whom were Federalists—Marshall and Washington — and three Republicans — Johnson, Livingston and Story.

#### POWER OF SUPREME COURT TO HOLD STATE STATUTES UNCONSTITUTIONAL

With the probable exception of the Fugitive Slave Law, no Act of Congress was ever opposed so bitterly as that which chartered the Bank of the United States. It will be remembered that this Act was sponsored in



1791 by Hamilton, Secretary of the Treasury in Washington's Cabinet, and was opposed by Jefferson, Secretary of State, and by Madison and Monroe. Congress, however, chartered the Bank for a period of twenty years and it was very successful. This led to the establishment of a number of State Banks throughout the country and within a short time there was a bitter rivalry between these institutions. The State Banks carried the fight to Congress, which body refused to re-charter the national institution at the expiration of its charter, the deciding vote in the Senate being cast by Vice-President George Clinton who had bitterly opposed the Constitution in the New York Convention. The State Banks, however, failed to meet the emergency caused by the War of 1812, and in 1816 Congress re-chartered the old Bank of the United States.

The State Banks at once renewed the fight against their former rival, and many States began a systematic effort to destroy it. The Constitution of both Illinois and Indiana prohibited the Bank or any of its branches from doing business in those States. Kentucky imposed an annual tax of \$60,000 on each branch of the Bank doing business in that State; Tennessee, \$50,000; North Carolina, \$5,000, and Georgia imposed a tax equal to thirty per cent of the Bank's capital stock. Public sentiment in the other States was such that adverse legislation was imminent.

If the National Bank was to survive something had to be done and done quickly. Two cases finally reached the Supreme Court which definitely fixed the Bank's status, construed the powers of Congress under the last paragraph of Section 8, Article I, of the Constitution,

known as the "Necessary and Proper Clause", and also established forever the Court's authority to hold State laws unconstitutional. These cases were *McCulloch v. Maryland*, 4 Wheaton, 316, decided in 1819, and *Osborn v. The Bank*, 9 Wheaton, 795, decided five years later.

**McCulloch v. Maryland, 4 Wheaton, 316.**

It was from Maryland that this anti-bank legislation first reached the Supreme Court. The Bank had a branch in Baltimore, and a Maryland statute required all banks within the State, established without State authority, to issue notes only of certain designated denominations and printed on paper stamped and taxed by the State or, in lieu thereof, to pay to the State an annual tax of \$15,000. A penalty of \$500 was imposed for each violation of the statute, which in this case would have amounted to several millions of dollars. One-half of every penalty recovered under the act went to the informer.

One John James, on behalf of himself and the State, brought suit against McCulloch, cashier of the Bank, to recover the prescribed penalty for a violation of the statute. The State courts upheld the law, and McCulloch applied for, and was awarded, a writ of error by the Supreme Court of the United States. Two questions were before the Court for determination, namely, (1) the constitutionality of the Act of Congress chartering the Bank, and (2) the constitutional validity of the State law. The basic issue, however, was whether the Federal or the State Governments should be supreme under the Constitution.

Chief Justice Marshall rendered the opinion of the

Court which is his greatest judicial pronouncement. In fact, as a state paper it is the equal of the Constitution itself. In exalted language he held that it is for Congress alone to decide as to what laws are "*necessary and proper*" for "*carrying into execution*" the powers granted that body by the Constitution and, therefore, the Act chartering the Bank was constitutional. "Let the end be legitimate," said Marshall, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Marshall held the State statute unconstitutional and void because "the Constitution and the laws made in pursuance thereof are supreme and control the constitutions and laws of all the States." He further declared that if the States have the power to tax the instrumentalities of the Government, then they likewise have the power to destroy them, for "the power to tax involves the power to destroy, and the power to destroy may defeat the power to create; and if a State is permitted to destroy the instrumentalities of the Government by taxation, then the declaration that the Constitution and laws made under it shall be the supreme law of the land is an empty and unmeaning declamation. \* \* \*

The States have no power by taxation or otherwise to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

Marshall's decision threw many of the States into a frenzy—not because the Court had held an Act of Congress unconstitutional, but because of its failure so to do.

Virginia's Legislature adopted a resolution denouncing the decision as one "eminently calculated to undermine the pillars of the Constitution itself, and to sap the foundation and rights of State Governments." Pennsylvania, Indiana, Illinois, Tennessee and Kentucky supported Virginia with equal belligerency, while, strange to say, South Carolina joined New York and Massachusetts in supporting Marshall's opinion.

**Osborn v. The Bank, 9 Wheaton, 795.**

Ohio was the next State to join in the fight against the Bank. Only four days before *McCulloch's Case* was argued in the Supreme Court, the Ohio Legislature passed an act assessing an annual tax of \$50,000 against each of the Bank's two branches doing business in the State. If payment of the tax should be refused, the act authorized and directed the State Auditor "to enter the Banks, open the vaults, search the officers and seize all moneys, property and everything of value found on the premises or elsewhere."

In the meantime, the Bank obtained an injunction from the Federal Circuit Court restraining Osborn, State Auditor, from collecting the tax. Osborn ignored it, issued his tax warrant and sent his assistant, Harper, to Chillicothe to collect the tax. Payment being refused, Harper forcibly entered the Bank's vaults and seized specie and notes amounting to approximately \$120,000. Before reaching Columbus, however, a second injunction was served on both Osborn and Harper restraining them from delivering the money to the State Treasurer, which was likewise ignored and the money delivered. The Bank immediately instituted a suit in the Federal Court for damages against the officers, and also pressed its injunction suit.

It was after this episode that the Supreme Court rendered its decision in *McCulloch's Case*, which should have settled the controversy in Ohio. Its Legislature, however, was in session and immediately passed a resolution in which the decision was condemned in the most vigorous tones. The learned legislators declared that they had examined the arguments of the Chief Justice and "found them to be faulty," and concluded their resolution by directly challenging the Federal Government to make good Marshall's statement in *McCulloch's Case* that the "power which created the Bank must have the power to preserve it."

Upon a hearing in the Federal Circuit Court every contention of the State was overruled, and a decree entered which directed all money and notes seized by the officers to be returned to the Bank, and also enjoined the collection of the tax on the ground that the State statute was unconstitutional. The State Treasurer, however, refused to comply with the order. For this contempt he was arrested and committed to jail, the keys of the State Treasury forcibly taken from him by the United States Marshal, the vaults of the treasury entered and the money and notes seized and returned to the Bank. This was the answer of the Federal Government to the challenge of Ohio's Legislature. In one State, at least, the National Government had shown itself supreme.

The State, however, was deeply stirred and it immediately carried the case to the Supreme Court, where it revived the old States Rights doctrine raised by Virginia eight years before in *Martin v. Hunter's Lessee*, which denied the power of the Supreme Court to pass upon the constitutionality of a State law which had been upheld by the highest State Court, raised all the ques-

tions that had been decided in *McCulloch's Case*, and asked for a reconsideration of that decision. The further defense was made that the State officers having no interest in the case were only "nominal parties", hence the suit was, in reality, against the State, which suits are forbidden by the Eleventh Amendment; therefore, the Court was without jurisdiction in the premises.

In his opinion in this case, Chief Justice Marshall reaffirmed the holding in *McCulloch's Case*; held the Act of Congress chartering the Bank to be constitutional; and declared the Ohio law taxing the Bank unconstitutional. He also enounced a new and notable doctrine of constitutional law, namely, that while the Eleventh Amendment forbids suits against States it affords no protection to a State officer who acts under an unconstitutional statute; that Ohio's officers had acted under such a statute in committing a trespass and were liable notwithstanding their positions. From that time on the Bank had a comparatively quiet existence until it was finally destroyed by President Andrew Jackson.

This doctrine of liability of officers who act under an unconstitutional statute applies with equal force to officers of the United States who act under an Act of Congress which is unconstitutional, so held in *United States v. Lee*, 106 U. S. 196, to which reference is made in the discussion of Eminent Domain, Chapter X.

#### POWER OF SUPREME COURT TO REVIEW DECISIONS OF STATE SUPREME COURTS

No question has given greater concern to both Federal and State Governments than the authority exer-

cised by the Supreme Court of the United States to review decisions of the highest State Courts where Federal questions are involved. The fact that no such appellate jurisdiction is conferred upon the Supreme Court by the Constitution gave a more serious aspect to the question. It was Hamilton's view, however, that the Constitution vested in the National Government which it created the *implied powers* necessary to protect and preserve itself. This being true, he argued, there is an *implied power* in the Constitution which confers upon Congress the authority to enact all *necessary and proper* laws for the protection and preservation of the National Government; that the enactment of a Federal statute conferring such appellate jurisdiction upon the Supreme Court in all cases arising in State Courts which involve the Constitution, laws and treaties of the United States, was a *necessary and proper* measure, for in no other way could the Federal Government protect itself from destructive encroachment by the States. Congress accepted Hamilton's theory of *implied powers* and in 1789 passed the Judiciary Act, the 25th Section of which conferred such appellate jurisdiction upon the Supreme Court of the United States. Subsequent events have not only clearly demonstrated the correctness of Hamilton's interpretation of the Constitution but also the wisdom of such a statute, for it has on more than one occasion preserved the existence of the Union.

This 25th Section had been in effect for twenty-four years, and the Supreme Court had taken jurisdiction of a number of cases under it, when Virginia challenged its constitutionality and denied the existence of such appellate jurisdiction when the State statute in question had been upheld by the highest State court. This was

simply a restatement of the States Rights theory of the supremacy of the States over the National Government.

Two cases were decided by the Supreme Court which for all time conclusively established such appellate jurisdiction, but they did not quiet the bitter agitation which continued to disturb the country for years. These cases were *Martin v. Hunter's Lessee*, 1 Wheaton, 304, decided in 1816; and *Cohens v. Virginia*, 6 Wheaton, 264, decided five years later, both of which arose in Virginia. The former settled the Supreme Court's appellate jurisdiction in writs of error to State courts in civil cases, while the latter established such jurisdiction in criminal cases.

**Martin v. Hunter's Lessee, 1 Wheaton, 304.**

This case was the culmination of a series of suits in Virginia involving the title to the Lord Fairfax estate which consisted of about 300,000 acres of land lying wholly in that State. Fairfax was a Tory and fled to England at the beginning of the Revolution, where he died. His estate passed by devise to his nephew, Denny Martin. In 1777 the Virginia Legislature passed an act confiscating this estate, but the State did not actually take possession of the property. Hunter acquired 788 acres of this land through a grant from the State. Martin resisted Hunter's claim on the ground that since the State had not executed its confiscatory statute by taking actual possession of the property before ratification of the Jay Treaty, it could not do so afterwards because his rights were now protected by such Treaty. Thus, a Federal question was primarily involved.

In 1791 the same subject matter was first before the Supreme Court in *Hunter's Lessee v. Fairfax's Dev-*



isee, 3 Dallas, 305, when it was continued and for some reason dropped from the Court's docket. Some years later, however, the litigation was revived in Virginia in *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 602. In 1809 the State Supreme Court sustained the confiscation statute, which validated Hunter's title and completely stripped Martin of his inheritance. Martin appealed the case to the Supreme Court of the United States on the ground that it involved the construction and validity of a treaty with a foreign government.

Before his appointment as Chief Justice, Marshall had been interested in the controversy as counsel and declined to sit in the case. This phase of the case was decided in 1813, Justice Story rendering the opinion of the Court. Story had been appointed to the Court only two years before by President Madison. He had been an ardent Republican and a firm believer in States Rights, but judicial responsibility had given him a broad national vision equal to that of Marshall himself. Story reversed the State court and held that a Treaty made by the Federal Government under the authority of the Constitution takes precedence over all State laws.

The decision profoundly stirred the whole State and aroused the wrath of the States Rights leaders as nothing had ever done before. Upon receipt of the mandate the Virginia Supreme Court sat for six days in solemn deliberation whether to obey or defy the Supreme Court of the United States. It sought the advice of the leading members of its Bar and finally entered a formal order refusing its obedience, declaring that "under a sound construction of the Constitution, appellate jurisdiction of the Supreme Court of the United States does not extend to the Virginia Supreme Court, and so much

of the 25th Section of the Judiciary Act as extends such jurisdiction is unconstitutional.”

To this holding Martin obtained a second writ of error under the style of *Martin v. Hunter's Lessee*, 1 Wheaton, 304. Story again delivered the opinion of the Court which was concurred in by his three Republican, or States Rights, colleagues (Marshall not sitting), thus leaving Justice Washington as the only Federalist participating in the case. This opinion was Story's greatest constitutional utterance during his years of service on the Court. It is not only the equal of any of Marshall's great opinions, but has long remained the foundation for our great structure of Federal judicial power. He again reversed the Virginia Court and held that the much abused 25th Section of the Judiciary Act was constitutional; that by virtue of such section, the Supreme Court of the United States had appellate jurisdiction in every case involving the Constitution, laws and treaties of the Nation regardless of the court in which the case arose; and that the Constitution, laws and treaties made by the Federal Government agreeable therewith are supreme and supersede all conflicting State laws. What a blow to the States Rights advocates, and struck, too, by four of their own Judges!

**Cohens v. Virginia, 6 Wheaton, 264.**

While Virginia was, perhaps, ready to concede that such appellate jurisdiction had now been established in civil cases, it was quite unwilling to admit its existence in criminal cases. It was this construction of the Constitution and the 25th Section of the Judiciary Act by Virginia that produced the famous case of *Cohens v. Virginia*.

By an Act of Congress, the City of Washington was authorized to conduct lotteries. The defendants, P. J. and M. J. Cohen, were convicted and fined in Virginia for the sale of these lottery tickets in violation of a State law forbidding such sales. A Federal statute being involved, the case was carried to the Supreme Court of the United States. The States Rights leaders of Virginia again asserted that the issuance of the writ of error in this case was an unwarranted invasion of its rights as a sovereign State. The State legislature, by resolution, instructed counsel for the State to make formal appearance before the Supreme Court and to "answer to the question of jurisdiction alone, and if this be decided against them that they make no further appearance."

In accordance with their instructions, counsel for Virginia moved to dismiss the writ because the Supreme Court had no constitutional jurisdiction of a writ of error to a State court in a criminal proceeding. It was upon this motion that Marshall rendered his epochal opinion in which the Court overruled the contention of the State. Whereupon, counsel representing Virginia withdrew from further participation in the case. In the meantime, Daniel Webster, who represented New York in a similar case then pending, gratuitously appeared and argued the case on its merits on behalf of Virginia. The Court held that it was not the intention of Congress to authorize the sale of such tickets outside the District of Columbia.

Marshall's opinion on the jurisdictional issue is one of the greatest legal documents in our judicial history. As disclosed by the record, however, there was nothing in the case but a conflict of jurisdiction. Today such a case would not even excite local interest. The truth is,

it was likewise another judicial conflict between the Federal and State Governments for supremacy. Properly to understand the opposition which Marshall's opinion in this case excited it is necessary to go outside the record and consider the bitterness that had been aroused over the extension of slavery. The attempt in 1819 to admit Missouri as a State, and the "Compromise" in 1821 by which it was admitted, had divided both Congress and the people into two partisan camps. Secession was openly threatened in Congress and was even alluded to by counsel representing Virginia in their argument of the case. Marshall's opinion was more than a great judicial utterance. It was an appeal to the common sense of the American people for unity and union.

It must not be understood, however, that Marshall tried to compromise. On the contrary, in language that is exalted in its patriotism, he unequivocally declared the National supremacy over the States in all cases involving the Constitution, laws and treaties of the Nation and rebuked the southern threats of secession, just as he had rebuked the same spirit in Pennsylvania in *United States v. Peters*, 5 Cranch, 135, decided ten years before.

To Virginia's contention that the Constitution has "provided no tribunal for the final construction of itself \* \* \* and, therefore, this power may be exercised by every State in the Union \* \* \*", Marshall answered that the people themselves established the Constitution because experience had taught them the necessity of a closer and firmer union, and "this government would disappoint their hopes unless invested with a large part of the sovereignty which formerly belonged to the States"; that these "ample powers" were given to

the Government for reasons explained by the Constitution itself: "In order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare"; and this Constitution so established by the people leaves no doubt as to its supremacy, for it plainly states that it, and the laws and treaties made under it "shall be the supreme law of the land, and the judges in every state shall be bound thereby; anything in the Constitution or laws of any state to the contrary notwithstanding, \* \* \*."

#### POWER OF SUPREME COURT IN CASES AFFECTING COMMERCE

Trade discriminations made it apparent to the framers of the Constitution that the exclusive authority to regulate commerce with foreign nations and among the States should be vested in the National Government. In language as explicit as possible they provided in Section 8, Article I, of the Constitution, that "*Congress shall have power \* \* \* to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes*", which is commonly known as the *Commerce Clause*. Notwithstanding such prohibition, it was not long before the States began to encroach upon this strictly Federal prerogative. In two early cases, however, the Supreme Court forever halted such State interference with both foreign and domestic commerce among the States. Both opinions were rendered by Chief Justice Marshall and they are to be reckoned among his most far-reaching constitutional utterances. The first, *Gibbons v. Ogden*, 9 Wheaton, 1, decided in 1814, involved commerce among the States. The sec-

ond, *Brown v. Maryland*, 12 Wheaton, 419, decided in 1818, had to do with commerce with foreign nations.

**Gibbons v. Ogden, 9 Wheaton, 1.**

In 1808 the legislature of New York granted to Robert Fulton, inventor of the steamboat, and Robert R. Livingston, who financed his experiments, the exclusive right to navigate steamboats on all the waters of that State for a period of thirty years. They were also authorized to license vessels not owned by them and to seize and forfeit to themselves all unlicensed vessels found navigating such waters. Upon a license secured from Fulton, Ogden operated a ferry from New York City to New Jersey. Under a Federal coasting license, Gibbons carried passengers along the New Jersey Coast. Later, however, he extended his lines and discharged his passengers at New York City. Ogden secured an injunction in the State courts against this practice as an infringement upon his license obtained from Fulton. Gibbons carried the case to the Supreme Court of the United States, on the ground that the New York grant contravened the above quoted *Commerce Clause* of the Federal Constitution.

Marshall held the New York grant to Fulton and Livingston unconstitutional; that the Constitution grants to Congress alone the authority to regulate commerce "*among the several states*" in all its forms without restraint or interference by State legislatures. Marshall defined the words "commerce" and "regulate" as used in the Constitution. "Commerce", said he, "undoubtedly is traffic, but it is something more, it is intercourse", and includes navigation and all commercial intercourse among States and nations and is "regulated by prescribing rules for carrying on that intercourse."

The good effects of this decision upon the commercial and industrial development of our country are of inestimable value. In the first place, it destroyed similar monopolies in other States and greatly reduced freight and passenger charges by opening our waterways to unrestricted competition. Second, the application of steam power to railroads begun extensively five years later and this decision prevented like monopolies from being built up in this field of transportation within the various States—a condition which would have made impossible our present great inter-state transportation systems.

**Brown v. Maryland, 12 Wheaton, 419.**

Three years after *Marshall*, in *Gibbons v. Ogden*, had emancipated inter-state commerce from local dominance, he was likewise called upon to free foreign commerce from State interference and to assert the exclusive authority of the National Government in levying and collecting duties and imposts. Even at that early date the States were seeking the means of increasing their revenues by finding new subjects of taxation. With this end in view, the legislature of Maryland passed an act imposing a license tax of fifty dollars on all importers and wholesalers of imported goods. A penalty of fifty dollars fine and the forfeiture of the amount of the tax was also imposed for failure to secure such license.

Brown and Company of Baltimore were convicted of having sold a package of dry goods at wholesale without having first secured such license. The State court having upheld the statute and sustained the conviction, the case was taken to the Supreme Court on the grounds that such statute was in violation of both the *Commerce*

*Clause* and that clause which gives to Congress the power to lay and collect duties and imposts—both found in Section 8, Article I, of the Federal Constitution.

With unanswerable logic, Marshall held the statute in violation of both clauses of the Constitution and unequivocally asserted the exclusive control by the Nation over all foreign commerce.

In the thirty-four years that Marshall occupied his exalted position the Supreme Court rendered 1121 written opinions, 62 of which involved constitutional questions. In 519 of these cases the Court's opinion came from the fertile pen of the "Great Chief Justice". Thirty-six of Marshall's opinions involved great constitutional questions, and it was in these expositions of the Constitution that he displayed the political vision of a true statesman as well as the intellect of a great jurist. In these opinions he not only defined the boundaries of all subsequent constitutional construction, but likewise laid the foundations on which our whole constitutional system has been reared.

Let it not be inferred, however, that the work of interpreting the Constitution was completed at the death of Marshall. Through the years subsequent to his passing the Supreme Court has continued its application of our fundamental law to the necessities of a growing and progressive people; and, so long as our Constitution remains the "*supreme law of the land*", that great tribunal will continue to apply it to new problems and conditions as they arise in the ever-changing life of the American Commonwealth.



## CHAPTER XIII

### THE SUPREME COURT AND CONGRESS

*The Supreme Court of the United States is not only a most interesting, but a virtually unique creation of the founders of the Constitution. The success of the experiment has blinded men to its novelty. There is no exact precedent for it, either in the ancient or modern world.*

SIR HENRY SUMNER MAINE.

THE authority of the Supreme Court of the United States to determine whether State statutes are in violation of the Constitution, laws, and treaties of the Nation is now the settled judicial policy of the country. The necessity and correctness of this view is today conceded by every thoughtful individual and by all political parties. Likewise, the power of the Courts to pass on the constitutionality of Acts of Congress is established beyond the possibility of change. Nevertheless, the exercise of both these powers by the Court was the subject of bitter controversy throughout our early history, and the latter is even now denied by a few claptrap politicians who chance to be temporarily holding high places in official and political life. Not infrequently in the past a political party similar to the Progressives in 1924 has attempted to make it a political issue of national import. These circumstances undoubtedly justify some special consideration of this question.

The authority of the Supreme Court to determine the constitutionality of Acts of Congress is the keystone of the arch which not only preserves our priceless constitutional guaranties of personal and political freedom, but supports the whole fabric of our government. Tear it

out and the whole structure will collapse like a house of cards. It is for this reason, probably, that for a century and a quarter there has beat upon that great tribunal a veritable tempest of radical criticism the fury of which, at times, has threatened the very existence of the Republic.

These radical attacks upon our Supreme Court have become no less violent with the passing of the years. In the Seventy-first Congress during the debate on the confirmation of Judge Parker, who was nominated by the President for membership on that high tribunal, it was boldly asserted by the radicals in the Senate that the nominee, and even the Court itself, were but mere incidents in their fixed purpose to place upon that tribunal not our profoundest lawyers and greatest patriots, but "radicals" who happen to have the same so-called "modern views" as those held by these radicals in the Senate. Likewise, in the same Congress, in the debate on the confirmation of Chief Justice Hughes, there was voiced on the floor of the Senate such crass ignorance of the Constitution and its history, and such gross indifference to its personal and political guaranties of freedom, as to challenge the resentment of every true American.

Among the radical views then presented we find on page 3762 of the Congressional Record the following pronouncement by Senator Brookhart of Iowa: "I say that the action of Congress in passing, and the President in signing, a bill ought to be final as to its constitutionality. It is a mockery and a false pretense to say that Congress will not follow its own Constitution as intelligently and as faithfully as any court \* \* \*. It will now be my intention \* \* \* to offer and to press an amendment to the Constitution \* \* \* taking

away from the Supreme Court this power to set aside legislative enactments. It was assumed by the Court, \* \* \* and unless the Court \* \* \* is willing to recede from this extreme position \* \* \* we can and must meet it by a constitutional amendment, \* \* \* and I stand ready to offer that amendment. I stand ready to take it to the country in every State of the Union. \* \* \* The Constitution \* \* \* should be construed by representatives of the people. \* \* \*

This proposed constitutional amendment would strike at the very foundation of our constitutional structure, and if carried out would speedily undermine all rights reserved to the States and endanger, if not destroy, every vestige of individual and personal liberty now preserved to us by the Constitution. Therefore, the people must be on guard, for when such vagaries not only pass unchallenged in the Senate of the United States but receive a measure of approbation in that body, it is time that we give serious thought not only as to whether we may safely exchange the personal and political guarantees vouchsafed unto us by the Constitution for the doubtful assurance of an uncertain, and often temperamental, Congressional majority, but also to the qualifications of those whom we select to represent us in the highest law-making body of our country.

The radical proposal of Senator Brookhart, however, is less dangerous because it is not new, nor is he its originator. The first assault against the exercise of such authority by the Court occurred in 1802 during the debate on the bill to repeal the recently enacted Federalist Circuit Court Act. The Federalist leaders in Congress contended that the repeal bill, which deprived the newly

appointed Federalist Judges of their positions, was unconstitutional and that the Supreme Court would so hold. In reply the Republicans asserted for the first time that "Congress has the exclusive power to interpret the Constitution, \* \* \* and the Judge who dares to question this authority of Congress will be hurled from his seat."

In 1805, however, Congressional opposition to the Supreme Court on this score became even more violent. The astounding doctrine was then asserted that a judicial decision holding an Act of Congress unconstitutional was in itself sufficient grounds to support the impeachment of the Judges.

This opposition to the authority of the Supreme Court to pass upon the constitutionality of Acts of Congress continued down through the years with varying degrees of intensity. In 1912 the Socialist party declared against the exercise of such authority. The same year Ex-President Roosevelt headed the Progressive party, with one plank of his platform declaring for the recall of judicial decisions. In 1924 the late Senator LaFollette, as the candidate of the Progressive party, demanded a constitutional amendment to provide that when the Supreme Court has held an Act of Congress unconstitutional, and Congress subsequently repasses such Act by a two-thirds vote, it shall thereafter be held to be constitutional and forever free from attack.

Today Senator Brookhart and his fellow radicals, in order to override the Court, do not want even to take the trouble to pass a bill twice. They have gone back to the early position and are demanding a constitutional amendment that will invest Congress with the exclusive authority to determine the constitutionality of its own measures.

The right of every citizen or group of citizens, however radical, to strive peaceably to effect any change in our organic law which they desire is readily conceded. The advocates of change, however, must support their views by candid, lucid argument—not by mere declamation. On the other hand, those who oppose the suggested change must answer by sound, cogent reasoning,—not simply by denunciation. Let us apply this rule to the proposal of Senator Brookhart.

In vain do we search the Senator's public utterances for any argument which he adduces in support of his position. He simply asserts that the exercise of such power by the Supreme Court is "a mockery and a false pretense", an authority "improperly assumed by the Court", and there he is content to let the question rest. No danger lies in these opinionated effusions of the Senator from Iowa. At this time, however, he happens to be the official spokesman of an increasing number of "pink tea" radicals whose hearts are untouched by the "mystic chords of memory" which link us with a noble and heroic past; whose faith in the Constitution has become weakened; who distrust its wise restraints; who assert that the living should not be "cribbed, cabined, and confined" by an old parchment written by men dead these hundred years.

Unhampered even by the slightest knowledge of the Constitution or its history, and unmindful of its personal and political guaranties of freedom, these radicals seek to deprive the Court of this authority and to elevate Congress to a place of supreme autocratic power. They assert (1) that the Constitution confers no such authority upon the Court; (2) that Congress has never granted such power to that tribunal; (3) that the Court usurped such authority in *Marbury v. Madison* (see

Chapter XII), and since that time has continued its wrongful exercise.

True, the power to pass upon the constitutionality of Congressional legislation is not specifically conferred upon the Supreme Court by the Constitution, nor is such authority excluded. Therefore, unless this authority may be exercised by the Court as an *implied power* and is within the intent of that instrument, it does not exist and its exercise by the Court is a usurpation. For, as said by Justice Brewer in *South Carolina v. United States*, 199 U. S. 437, decided in 1905, "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. \* \* \* Those things which were within its grants of power as those grants were understood when made are still within them; and those things not within them remain still excluded."

To determine the authority which the Supreme Court may rightfully exercise over Congressional legislation it is necessary (1) to resort to a study of the Constitution and its history; (2) to ascertain, if possible, the intention of the framers of that instrument in this respect; (3) to consider the powers conferred upon State courts by the constitutions of the original Thirteen States from which sources our Federal Constitution was largely drawn.

From May 24 to September 17, 1787, fifty-five delegates from twelve States sat in Philadelphia and drafted our Constitution. The powers intended to be conferred upon the Supreme Court and all other questions were exhaustively debated, and after the submission of their work to the States for ratification these subjects were again widely discussed through the press, in debates, in

letters, and in *The Federalist* by Hamilton, Madison and Jay. What was intended by the framers of the Constitution respecting the power of the Supreme Court in this respect may be readily determined by even a casual examination of these sources.

The record shows that fifty-one of these delegates agreed that there should be a Supreme Court clothed with authority to determine whether Acts of the Congress violated the fundamental law; and when a subcommittee presented to the convention a completed draft of the Constitution, these same fifty-one delegates conceded that the Supreme Court therein created was invested with such authority. On this point four delegates at the time withheld their assent, but later two of these changed their views. In the course of the convention debates, Luther Martin of Maryland said: "As to the constitutionality of laws, that point will come before the Judges in their proper official character." Later, in a letter to the Maryland Legislature, Martin said: "The Judges will determine whether laws of the States or of Congress and acts of the President and other officers are, or are not, violative of the Constitution." John Rutledge, of South Carolina, said: "The Judges of every Court,—State, inferior Federal and Supreme, must uphold the supremacy of the Federal Constitution, whether against Acts of Congress or against State laws which may be held to infringe it." James Madison affirmed: "A law violating a Constitution established by the people themselves would be considered by the Judges as null and void." And two years later, in a letter to Governor Johnston of North Carolina, Madison further affirmed: "The exposition of the Constitution must continue until its meaning on all points shall

have been settled by judicial precedent." Eldridge Gerry of Massachusetts said: "Judges' exposition of the laws involves the power of deciding on their constitutionality." In the debates in the Virginia Convention, in reply to Patrick Henry's suggestion that the legislative power of the proposed government would prove practically unlimited, John Marshall said: "If they (the United States) were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution, which they are to guard against. \* \* \* They would declare it void." On September 26, 1798, in a letter to Archibald H. Rowan, Jefferson declared: "The laws of the land, administered by upright judges would protect you from any exercise of power unauthorized by the Constitution of the United States."

Moreover, during the struggle over the ratification of the Constitution, in answer to its opponents, Hamilton wrote *The Federalist* No. 78, the greatest exposition of the powers of the Supreme Court that has yet been written. In it he stated and answered the identical issue now raised by Senator Brookhart. "Limitations to the Legislative authority", said he, "can be preserved, in practice, in no other way than through the medium of Courts of Justice, whose duty it must be to declare void all acts contrary to the manifest tenor of the Constitution."

In the Connecticut convention Oliver Ellsworth, one of the delegates to the Philadelphia Convention and later Chief Justice, said: "This Constitution defines the extent of the powers of the general government. If the general legislature (Congress) should at any time overleap their limits the judicial department is a con-



stitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the National judges, who, to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the States go beyond their limits, if they make a law which is a usurpation upon the Federal (National) government the law is void; and upright, independent judges will declare it to be so."

In 1802 Gouverneur Morris said in the United States Senate: "When you (Congress) have enacted a law, when process thereon has been issued and suit brought it becomes eventually necessary that the Judges decide on the case before them and declare what the law is \* \* \* . The decision of the Supreme Court *is*, and of necessity *must be*, final \* \* \* . If the legislature may decide conclusively on the Constitution, the sovereignty of America will no longer reside in the people but in Congress, and the Constitution is whatever they choose to make it."

In other words, the people themselves through their Constitution set up this government, created the Executive and Legislative branches thereof and prescribed the powers and limitations of each. They likewise reserved to the "*States respectively, or to the people*", all powers which were not thus granted; and more effectually to safeguard these reservations from either Executive or Congressional usurpation, they set up a watch in the Supreme Court with power to check any encroachment upon their rights. This Constitution was approved by the Convention which drafted it and afterward ratified by the people, with the full knowledge that there was an *implied power* therein which author-

ized the Supreme Court to determine the constitutionality of Acts of Congress. Moreover, such authority in the Court is clearly implied by necessity. As said by Hamilton, "the Constitution surely has the strength to preserve itself", and without such authority in the Supreme Court the Nation would cease to be a Republic; the Constitution would become a dead letter; the guaranties of the Bill of Rights unenforceable; and the declaration that the Constitution and the laws and treaties made in pursuance thereof shall be the "*supreme law of the land*" would be a hollow mockery. Under such a construction of our fundamental law the will of Congress would be supreme, and the rights, liberty, and even the very lives of individual citizens, would be wholly subject to the caprice of a Congressional autocracy.

The first Congress under the Constitution convened on March 30, 1789. Ten of its eighteen Senators and eight members of the House had been members of the Convention which drafted the Constitution. Five Senators and twenty-six members of the House had been members of state conventions which ratified it. They had heard the Constitution debated clause by clause by the men who made it. They knew what was intended by its every word, and they all conceded that the Supreme Court possessed such power. Moreover, the existence of such authority in the Court was likewise asserted by the members of every Congress from the First to the Fifth, inclusive, and also by the leaders of both the Federalist and the Republican parties prior to 1802.

In that First Congress occurred the first and second great constitutional debates in Congress. The first involved the authority of the President to remove, with-

out the consent of the Senate, an officer who had been appointed "with the advice and consent" of that body. The question was not settled, but all the constitutional giants who engaged in that debate concurred in the view that the decision must ultimately rest with the Supreme Court. One hundred and thirty-seven years later, in *Myers v. United States*, 272 U. S. 52, the Court held that the President possessed such authority. The majority opinion by Chief Justice Taft holding unconstitutional an Act of 1876, which provided that a postmaster could be removed only "with the advice and consent of the Senate", will always rank among the great constitutional decisions of the Court, and is a complete vindication of both Andrew Jackson, who was censured by a Senate Resolution, and Andrew Johnson, who narrowly escaped removal, because of the exercise of such executive power.

The second debate involved the constitutionality of the Act of Congress chartering the Bank of the United States. In that debate the leaders of both the Federalist and the Republican parties unanimously agreed that the final authority to determine its constitutionality was invested in the Supreme Court; and when the Court, in *McCulloch v. Maryland*, decided in 1819, finally upheld the constitutionality of the Act, the criticism directed at that tribunal was not for taking jurisdiction, but because it failed to hold the Act unconstitutional.

Three years after the adoption of the Constitution, in *Hylton v. United States*, 3 Dallas, 171, the Supreme Court for the first time took jurisdiction of a case involving the constitutionality of an Act of Congress. It held the Act to be constitutional, and it is significant that neither the framers of the Constitution nor mem-

bers of Congress then charged the Court with usurping authority. Nine years later, 1803, in *Marbury v. Madison*, 1 Cranch, 152, the Court for the first time held an Act of Congress unconstitutional. History shows that at the time of this decision thirty-nine out of the fifty-five members of the Constitutional Convention were still alive. If the Court in that case had usurped a power not given or intended to be given by the Constitution, surely some one of these survivors would have protested. Yet history records no such protest, and the only objection raised by Congress to the decision was the doctrine therein enounced that a *mandamus* might lie against a member of the Cabinet.

Therefore, if the framers of the Constitution, the people who adopted it, the first Congresses, and the early party leaders all conceded that the Supreme Court was invested with such power, how then may its present exercise by that tribunal be said to be a usurpation of authority? However, the wisdom of the political geniuses who founded this republic means nothing to our present-day radicals. They seem unable to comprehend that some way, somehow, every present is born of the experiences of the past, and, therefore, to them the past teaches no lessons.

There is, however, still another and more cogent reason for the existence of this *implied power* in the Supreme Court. The last paragraph of Article VI, of the Constitution provides that "*All \* \* \* judicial Officers \* \* \* of the United States \* \* \* shall be bound by Oath or Affirmation, to support this Constitution; \* \* \**" It is manifest, therefore, that when the Courts are confronted with an Act of Congress which contravenes the Constitution, they must, under their oath, declare such Act void and of no effect.

To decide otherwise would mean not only a violation of their oath, but the destruction of the instrument that they have sworn to support.

Mr. Brookhart and his co-radicals further assert that if the framers of the Constitution had intended to confer upon the Court the power to determine the constitutionality of Acts of Congress they would have expressly so stated in that instrument. But these critics overlook the fact that the Constitution does not expressly confer any specific judicial powers upon the Supreme Court. Therefore, if powers are to be withheld from that tribunal because of the lack of express grants in the Constitution, then it will not possess *any* authority. Section 1, Article III, of the Constitution simply provides that "*The judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish.*" Thus it will be observed that this *judicial power* is neither restricted nor defined. Therefore, it includes all the authority which the various State courts possessed and exercised under the common law at the time the Constitution was adopted, which included the power to hold State statutes unconstitutional. For example, the Constitution does not expressly grant to the Supreme Court the power to enter judgment, to issue execution, to enjoin, to commit for contempt, or to do any of the acts which the Court performs as a judicial body. But all such powers, including the authority to hold Acts of Congress unconstitutional, are vested in that tribunal by reasonable and necessary implication. To hold otherwise is to say that the Court is wholly impotent and its creation a meaningless gesture.

This unwarranted radical contention arises from a

confusion of the terms "jurisdiction" and "judicial power", as contemplated by the Constitution, and there is a wide distinction between them. "Jurisdiction" relates to the subject matter to which the "judicial power" extends and over which it may be exercised. Section 2, Article III, of the Constitution, both limits and defines the "jurisdiction" of the Federal Courts, but the Federal "judicial power" is left unrestricted and undefined by the Constitution.

It is likewise true that by enacting the Judiciary Act in 1789, Congress indirectly, at least, conferred upon the Supreme Court the authority to determine the constitutionality of Acts of Congress. The 25th Section of such Act, which was passed without any dissent and is still the law, specifically grants to the Supreme Court the authority to "*reverse or affirm*" any decision of a State court wherein an Act of Congress has been held unconstitutional. The power thus vested in the Supreme Court to "*affirm*" a State court, that has held an Act of Congress unconstitutional, necessarily confers upon it the authority to hold Acts of Congress unconstitutional.

Our Federal Constitution was drawn largely from the early State constitutions, and in each of the original States its Supreme Court freely exercised the power to hold State laws violative of their respective State constitutions and that, too, without any specific constitutional provision authorizing such action. In all the States the judicial authority to determine that whenever there was an evident opposition, the laws ought to give way to the Constitution, was a power which had been found to be the necessary accompaniment of the effective existence of state constitutions. Again, all

our State governments are modeled after the Federal Government, with their executive, legislative and judicial branches, and in every State its Supreme Court now exercises the authority to pass upon the constitutionality of acts of their respective State legislatures. Therefore, the constitutions of the several States, and the decisions of their courts with respect thereto, are as much a part of the great body of constitutional law as is the Constitution itself.

The Constitution divides our government into three distinct branches, but they are not entirely independent of each other. Each branch, it is true, has limited powers in itself, but each branch also has a curb or check on the operations of the other. The powers given to Congress by the Constitution are not general, but limited. Therefore, a check against it must exist somewhere. Where then may such check be found, if not in the Supreme Court? In 1830, Daniel Webster, speaking in the Senate on this identical question, said: "The people erected this government. They gave it a Constitution in which they enumerated the powers they bestowed upon it. All others were reserved to the States or the people. \* \* \* No definition can be so clear as to avoid the possibility of doubt; no limitation so precise as to exclude all uncertainty. Who, then, shall construe the grant of the people? \* \* \* To whom lies the last appeal? This, the Constitution itself decides by declaring that 'the judicial power shall extend to all cases arising under the Constitution and laws of the United States.' These two provisions cover the whole ground. They are, in truth, the keystone of the arch. With these, it is a Constitution; without them, it is a Confederacy."

Again, under such a plan Congress may repeal or alter any Amendment to the Constitution. The provision requiring the submission of a proposed amendment to the people of the several States for ratification or rejection would become a dead letter, for Congress may then pass any Act, admittedly unauthorized by the Constitution, and its mere passage will make it constitutional.

But there is still a more serious objection to the Brookhart plan. If the Supreme Court were thus deprived of the power to pass upon the constitutionality of Acts of Congress, such power would still remain in the Supreme Courts of the several States in all cases coming before them which involved a Federal statute, and such decisions would be final. Thus we might have the Constitution meaning one thing in one State and something else in another State, depending on whether Acts of Congress were upheld or annulled by State Supreme Courts. Hence, a Federal statute would be subject to the construction of forty-nine different courts of last resort—forty-eight by the States and another by the Supreme Court of the United States. Such a condition would ultimately destroy all uniformity of obligation and result in such political and business chaos as would inevitably destroy the Republic itself.

One reason assigned by the critics of the Supreme Court for such a restrictive amendment is that a large part of its activities has been devoted to holding Acts of Congress unconstitutional. The astounding truth is, however, that in the one hundred forty-three years since the adoption of the Constitution, only fifty-five Acts of Congress and one Joint Resolution have been held unconstitutional. Only two such cases occurred



prior to the Civil War, while fifty-three have been decided since that time, the last being *Nichols v. Coolidge*, 274 U. S. 531, decided in 1927, which held a clause of the Revenue Act unconstitutional. However, this increase has been largely due to the vast increase in Congressional legislation on matters that concerned only the States. Of these fifty-five decisions only eleven have ever received serious criticism. The remaining forty-four are not only universally recognized today as correct, but as vitally important in preserving the right of both individuals and the States against encroachments by the Federal Government.

Of the eleven decisions so criticized, at least six are no longer of any consequence. The doctrine of the *Dred Scott Case* was effaced by the Civil War; the *Legal Tender Case* was reversed by the Court; the *Income Tax Case* was cured by the Sixteenth Amendment; the holding in the *First Employers Liability Law Case* was cured by Congress passing a properly worded Act; the doctrine enounced in the *Workmen's Compensation in Admiralty Case* may be similarly cured at any time, and the *Monongahela Navigation Case* is now recognized as clearly right.

The five cases which are still criticized are *Adair v. United States*, 208 U. S. 161, 1908, known as the Adair Case, which held invalid one section of an Act of Congress making it a misdemeanor for a railroad company to discharge an employee for belonging to a labor union; *Hammer v. Dagenhart*, 247 U. S. 251, (1912) known as the *First Child Labor Law Case*; *Eisner v. Macomber*, 252 U. S. 189, (1930) known as the *Stock Dividend Case*; *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, (1922) known as the *Second Child Labor Law*

*Case*; and *Adkins v. Children's Hospital*, 261 U. S. 525, (1923) known as the *District of Columbia Minimum Wage Law Case*. Whether any of these decisions are erroneous, is an open question. But assuming all five to be so, it affords no ground for demanding a complete revolutionary change in our form of government. The Supreme Court may have made mistakes in the past, and it may err in the future. But, as said by President Coolidge in 1924, "It is not necessary to prove that the Supreme Court never made a mistake; but if this power is to be taken away from it, it is necessary to prove that those who are to exercise it, would be likely to make fewer mistakes."

Such a restrictive amendment is necessary, assert these critics, because too many of the Court's decisions overruling Acts of Congress are determined by a five to four vote. Again they are not sustained by the facts. It is a significant fact in our history, however, that nearly all of the Court's decisions involving great constitutional questions have been rendered by a divided Court, and in a few cases by a majority of only one. To realize the dangers we have thus escaped one has only to read the dissenting opinions from the organization of the Court down to the present time. These differences of opinion make it apparent that those who are appointed to positions on that great tribunal must not only be capable of sounding the depths of the law, but likewise able to delve deep into the virgin fields of constitutional law, where mere precedents cannot avail, and where all the resources of wise, prudent and discerning statesmanship are indispensable requisites.

Of the fifty-five cases wherein Acts of Congress have been held unconstitutional twenty-three were unani-

mous; in seven cases only one Judge dissented; in twelve only two Judges dissented; in five three Judges dissented; and in only eight cases was the vote five to four. Of the five decisions which are criticized today, only two, the *First Child Labor Law Case* and the *Stock Dividend Case*, were decided by a five to four vote. The *Adair Case*, of which organized labor still complains, was decided by a six to two vote; the *Second Child Labor Law Case*, eight to one; and the *District of Columbia Minimum Wage Law Case*, five to three.

That these critics of the Court are insincere is clearly demonstrated by their attitude in two cases, namely, the *Northern Securities Case*, decided in 1904, and the *Adair Case*, decided in 1908. In the former an Act of Congress was held unconstitutional and a great capitalist holding company was dissolved by a five to four decision, while the latter was decided by a vote of seven to two. These critics found no fault with a decision which went their way by a five to four vote, nor were they satisfied when they lost one by a vote of seven to two.

If the Constitution when submitted to the people for ratification had contained a provision making Congress supreme, its rejection would have been inevitable. The States would have been unwilling then, and they should be unwilling now, to surrender to the exclusive guardianship of Congress, not only the powers reserved to them by the Constitution, but even their very right to exist as separate governmental entities. For under such a plan state lines could be altered or States destroyed at the Congressional will.

To deny such power to Congress does not indicate a

lack of confidence in that body. It is simply safeguarding our liberty. The powerful words of Jefferson on this subject are applicable today. He said: "It would be a dangerous delusion if our confidence in the men of our choice should silence our fears for the safety of our rights. \* \* \* Our Constitution has accordingly fixed the limits to which, and no further, our confidence will go. In question of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."

To the potential dangers incident to an assumption of such authority by Congress, the radicals make two answers: (1) That if such an amendment were adopted, Congress would never enact such unconstitutional legislation; (2) if Acts of Congress are to be declared unconstitutional, such power should be exercised by the representatives of the people in Congress.

It is no answer to say that Congress would never exercise such power by passing unconstitutional legislation. It has passed many such Acts in the past and will no doubt pass many more in the future. But under our present plan no one branch of the government, not even the three branches combined, can deprive the people of their constitutional rights. Why then should the people by the adoption of such an amendment surrender the guaranties vouchsafed unto them by the Constitution and trust wholly to the doubtful generosity of a temporary, and possibly temperamental, Congressional majority?

The Senator from Iowa assumes much when he says that Congress will follow "its own" Constitution. Whence comes this assumption of proprietorship in the Constitution? That instrument was created by the

people before Congress had an existence. They declared it to be the supreme law of the land. By it they created Congress, the Supreme Court, and the Executive branch, prescribed the duties of each, and, for their own protection, fixed certain limitations upon the powers of each. Therefore, since Congress and the Court were each created by the people and each represent the people, why should this power to pass on the constitutionality of Acts of Congress be lodged with Congress rather than with the Court where the people fixed it? The Senator's insidious assumption of congressional proprietorship in the Constitution is strongly indicative of that type of demagogic political activity which denounces the authority exercised by others as tyrannical, but when exercised by itself it speedily assumes the role of tyrant. Whenever we concede the Constitution to be the possession of Congress rather than of the people, there remains but a short step to political dictatorship.

It should also be remembered that the Supreme Court has no jurisdiction to decide constitutional questions except when they arise in actions at law or in suits in equity which come before it in actual litigation. The constitutionality of an Act of Congress can be determined only when it actually affects some individual or corporate right which is before the Court for determination. The Court will not hear fictitious or collusive cases. Nor will it ever declare legislation unconstitutional unless it is absolutely necessary to a determination of the case before it. Moreover, the repugnance of the Act to some express provision of the Constitution must be clearly apparent; a doubt, however grave, is not sufficient. In such cases the Court will express no *obiter* opinions, and a decision once reached, even by a divided Court, will

not be departed from. In only one instance in our history has the decision of a constitutional question been reconsidered and a different result arrived at; and that was upon a rehearing of the same case (*Income Tax Case*),—the Court being divided in opinion on both arguments. It is another rule of construction in such cases that when only a part of an Act is found to be an infringement, the remainder will be valid.

## CHAPTER XIV

### CONCLUSION

*A thousand years scarce serve to form a state; An hour may lay it in the dust.*

LORD BYRON—*In Childe Harold.*

*Liberty means freedom in the enjoyment of all one's faculties in all lawful ways, the liberty to earn a livelihood by any lawful calling, the liberty to live and work where one wills.*

SUPREME COURT OF THE UNITED STATES IN  
*Allgeyer v. Louisiana*, 165 U. S. 578.

THIS study of our Constitution suggests two pertinent inquiries: First, has that instrument been of such benefit to mankind as to justify its continued existence; second, if so, how may we best preserve and transmit it to posterity unimpaired.

That our achievements under the Constitution are sufficient to justify its preservation is beyond doubt or cavil. It has lasted nearly a century and a half substantially unchanged, and has given us what is today the oldest and most stable government in the world—a government strong enough always to meet the demands of the present and broad enough to admit the needs of the future. It has met every legitimate test and accomplished every purpose for which it was designed. It survived the storm of civil war, and has expanded to meet the unforeseen growth of our territory from thirteen insignificant commonwealths stretched along the Atlantic seaboard to forty-eight great States extending from ocean to ocean, and also to include many islands

of the sea. Through the long unfolding years it has been tried in the crucible of men's minds and hearts. It has seen dynasties perish; kingdoms fall; empires of a thousand years vanish; and the once powerful Hohenzollern, Hapsburgs, Romanoffs, and Bourbons pass into the night of exile. Yet, notwithstanding changed conditions in life and thought, it still lives, stronger in power and influence, both at home and abroad, than ever before—the pride and protection of 125,000,000 people and the hope for multiplied millions yet unborn.

Our Constitution also justifies its preservation because it is the soul of America, and America is indeed the fulfillment of all the aspirations and hopes of men through countless centuries; the only country in all the world where every career is open to talent and ambition; where a Lincoln, the motherless child of a backwoodsman, dreaming before the dying fires of his humble home, with nothing to recommend him save a courageous heart and an indomitable purpose, could thread his way from a cabin on the frontier to the throne of the world's greatest democracy without standing in the way of the humblest citizen. The instances in our history where the poor and lowly have risen to eminence and fame are not accidents. They are the legitimate fruit of our Republic. Never was this fact more strikingly illustrated than in the Presidential campaign of 1928, when the candidates of both great political parties came from the ranks of the poor—one an orphan from an humble home in Iowa; the other, an orphan from the squalor of an East Side New York tenement. Truly such a government is worth living, fighting and dying for.

No one would assert, however, that our Constitution is perfect. Perfection can be claimed for no human in-



strumentality. But it is certain that it defines the rights and duties of government, distributes its powers, prescribes the manner of their execution, and secures to the individual citizen a higher degree of political, commercial and intellectual freedom than any other government, past or present, yet instituted among men. The prophecy of the great William Pitt, uttered shortly after our Constitution was written, that "It will be the wonder and admiration of all future generations and the model of all future constitutions", has been literally fulfilled, for it has been used as a model not only by the forty-eight States in the formation of their own constitutions, but by all republics throughout the world.

Notwithstanding our past achievements and present eminence, our Constitution is being attacked today by the vicious and ignorant, in high places and low, as never before. The radically vicious element boldly proclaims that it is simply an outworn shell which should be destroyed. The second group, equally ignorant but less radical, while professing loyalty to the Constitution, would likewise destroy it by successive amendments that are foreign to its nature and destructive of its purpose. Hence, ours is no longer a question of how the Constitution shall be interpreted, but how shall it be preserved.

In the first group are found the communists and other ultra-radicals who would destroy the constitutional pillars which support our whole governmental fabric and thus bring down the whole structure upon our bewildered heads. They appeal especially to the American worker by the boast that "In Russia the Revolution has abolished individualism and all are now equal", and that it is this equality which they seek to establish in America.

The term "equality" has an alluring fascination for

the ignorant and the unwary. As interpreted by the Bolsheviki, however, it is a false and destructive philosophy. No system of government can or should do more than guarantee to its citizens equal and like opportunity, an equal chance in life, and equality before the law. All these things our government has accomplished. It has developed in its citizens a spirit of self-reliance, without which no government and no people can long endure. But no government, whatever its character, can ever guarantee equality of opportunity to weakness and to strength, to sickness and to health, to indolence and to industry, to stupidity and to intelligence, to extravagance and to thrift. No government, therefore, which destroys individualism can ever have equality among its citizens.

In America individualism is not repressed, but every man may attain to the highest accomplishment for which nature has fitted him. We recognize the fundamental principle that the value of man lies not in what he is or has, but in what he may become. The opportunity afforded to all men of realizing their highest aspirations is the proudest achievement of America. For this, the communists would substitute the tyranny of mediocrity and reduce all to that dead level of accomplishment which is within reach of the most incompetent. Such a system of government is below the instincts of a savage.

There is nothing in communism with its system of forced labor to appeal to the American worker. In this country both the farmer and the industrial worker are free agents. They may go where they choose, work when they please, and change their occupation at will. Not so in Soviet Russia. There, all real estate and industrial enterprises are owned and operated by the government. The peasant farmer is glued to the soil, told

when and how long to work, what and how much to raise and has the price of his product fixed by government decree. The industrial worker is likewise assigned to his living quarters and bound to his work, his task allotted and his meager wages fixed by the same authority. Neither may change his location nor his work without government permission. If the worker is discharged he cannot secure employment elsewhere. He loses his right to food and a place to sleep. He is usually sent to a lumber camp, where he receives only the poorest food and lodging in exchange for his labor, or he may be exiled to Siberia. In America, workers may organize and enjoy the benefits of collective bargaining and go out on strikes if necessary to enforce their demands. In Russia, (the Utopia of American communists) workers may also unionize and even go out on strikes. If they stay out too long, however, they are executed as counter revolutionists. Hence, there are no strikes in Russia. In addition, the people live in constant fear of the O. G. P. U.—the ever present but secret spies of the government.

If the history of human government has revealed any forestanding fact, it is, that the absolute authority of the individual or the unrestrained will of the mob is equally tyranny. The present regime in Russia is no exception to such rule. At the head of this vast system of oppression is Stalin—a cruel, ruthless, bloodthirsty tyrant, exercising the authority of supreme dictator, with absolute power of life and death over a despairing people.<sup>1</sup> This is the system which 1,600,000 com-

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1. Report of Col. Clarence T. Starr which appeared in Nations Business, September, 1931. Col. Starr, an American mining engineer of thirty years' experience, spent three years in Russia in a similar capacity, returning in 1931.

munists, or one per cent of the population, have forced upon an unhappy nation by the bayonet. This is the benign rule of liberty and freedom which a clique of foreign scum and a few addle-pated Americans are trying to force upon America.

The object of the second group, while less radical, is equally dangerous. The Constitution may be as effectually destroyed by the amendment process as by direct attack. It is contended by this group, for example, that the method prescribed by Article V for amending the Constitution is too long and cumbersome; that it is not responsive to the rapidly changing necessities of our progressive Republic; that it should be changed so as to make the amending process less difficult.

This criticism is not justified. In fact, such a change in our organic law means nothing less than its ultimate destruction by the slow but deadly process of erosion. Only ten times has our Constitution been amended, the first ten amendments having been approved at one time. The longest period of time that elapsed between the submission of a proposed amendment and its adoption was that in the case of the Sixteenth, which was before the States for three years, six months and twenty-four days. The shortest period was in the case of the first ten, which were before the States only eight months and twenty days. The average time for all amendments is one year, seven months and six days.

The fact that it requires an average of eighteen months to effectuate a desired change in our fundamental law is not a substantial objection. On the contrary it is a decided advantage, and at the same time affords sufficient proof of its flexibility. Such delay produces a more careful consideration of the proposed

change and if it be truly beneficial, its chances of success are greatly strengthened. If it be not desirable, there is all the more reason why undue haste should be avoided. The Prohibition Amendment was before the States for thirteen months, and we now hear it asserted that its ratification was rushed through the various State legislatures before the people had time to weigh and consider it. If such criticism be true, it is but another proof of the flexibility of our Constitution and its adaptability in meeting the advancing opinions of a majority of the people.

This Republic has come to us by inheritance, and therein lies a danger. It is human nature to take an inheritance for granted, to accept it as a matter of course, to deem it unnecessary to defend that for which others fought that it might be ours. But institutions and governments do not, and cannot, preserve themselves. They can be preserved only through the watchfulness of those into whose guardianship they have been committed. Therefore, the people who created our Constitution and who are its guardians must be constantly watchful against its enemies who are within our gates, and valiantly defend it against every destructive influence emanating from whatever source.

To defend the Constitution, however, does not mean that we should oppose every suggested reform or proposed amendment. The Constitution is not a static instrument, but an ever-changing document, sensitive always to the needs of a progressive people. Article V clearly indicates that its framers intended that it should be amended "*whenever two thirds of both Houses*" (of Congress) and "*the legislatures of three fourths of the several States*", or "*conventions in three fourths there-*

of", shall deem it necessary. It also provides two methods by which amendments may be adopted. But to merit our consideration, all such proposed amendments must be consonant with one or more of the great purposes of the Constitution itself, that is, to "*form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare*" or to "*secure the blessings of liberty to ourselves and our posterity.*" Unless it clearly appears that a proposed amendment accomplishes one or more of these purposes, it has no place in our fundamental law.

Trivial changes in our Constitution are not to be tolerated, nor are the apparently essential changes to be undertaken lightly. In fact, it is only the part of wisdom to abstain from any change until the actual existence or threatened approach of danger is satisfactorily demonstrated. Moreover, before any proposed Constitutional amendment is approved, three things should clearly appear, namely, (1) that there is a present necessity for the proposed amendment; (2) that such an amendment will remove the existing or threatened evil; (3) that such an amendment, if adopted, will not of itself produce a greater evil than that which it seeks to cure. Every proposed amendment to our Constitution should be made to stand or fall by this test.

In the final analysis, if our Constitution is to be preserved, those who understand its blessings and appreciate its benefits must teach the less appreciative among them, both citizen and alien, (1) that it is truly these great constitutional guaranties which protect their property, their liberty and even their very lives; (2) that, because of such guaranties, this is in truth a land of equal justice and opportunity for all; (3) that if there

be abuses, they are not due to our form of government, but to the people themselves who fail to exercise their rights, and neglect the duties of citizenship; (4) that, in the language of Pericles in his advice to the Athenians, "Our State does not enter enviously into a comparison with the laws and systems of others. We do not imitate them; but rather we provide them with an example."

This Nation, moreover, will never be free from the consuming fires within until the Constitution is carried into the home, the school, the lodge, the club, and even into the church itself; until every citizen, rich and poor, young and old, shall be made to feel a new sense of personal security in its guaranties, and a deeper feeling of gratitude for the blessings which it assures to this and to all future generations; until he shall be made to realize that it is the crowning fruition of thousands of years of painful struggle by the common man to elevate himself above the condition of a serf; until he shall be made to see that it proclaims the greatest truths, the noblest sentiments, and the broadest principles of freedom of any government the world has yet known; until he shall be made to assume an individual responsibility for its preservation. Then, and then only, will the Constitution be safe from assault both from within and from without.

*O beautiful for spacious skies  
And amber waves of grain,  
For purple mountain majesties  
Above the fruited plain,  
America! America!  
God shed His grace on thee,  
And crown thy good with brotherhood  
From sea to shining sea.*

KATHARINE LEE BATES

THE END





Appendix I

**DECLARATION OF INDEPENDENCE**



# DECLARATION OF INDEPENDENCE—1776

IN CONGRESS, JULY 4, 1776

*The unanimous Declaration of the thirteen united States of America.*

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpa-

tions, pursuing invariably the same Object, evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government and to provide new Guards for their future security. Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned

to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of officers to harrass our People, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislature.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended Legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences;

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Government:

For suspending our own Legislature, and declaring themselves invested with Power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our re-

peated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People.

Nor have We been wanting in attention to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the Protection of

Divine Providence, we mutually pledge to each other  
our Lives, our Fortunes and our sacred Honor.

JOHN HANCOCK

*New-Hampshire.* JOSIAH BARTLETT,  
WILLIAM WHIPPLE,  
MATTHEW THORNTON.

*Massachusetts-Bay.* SAML. ADAMS,  
JOHN ADAMS,  
ROBT. TREAT PAINE,  
ELBRIDGE GERRY.

*Rhode-Island, &c.* STEPHEN HOPKINS,  
WILLIAM ELLERY.

*Connecticut.* ROGER SHERMAN,  
SAMUEL HUNTINGTON,  
WILLIAM WILLIAMS,  
OLIVER WOLCOTT.

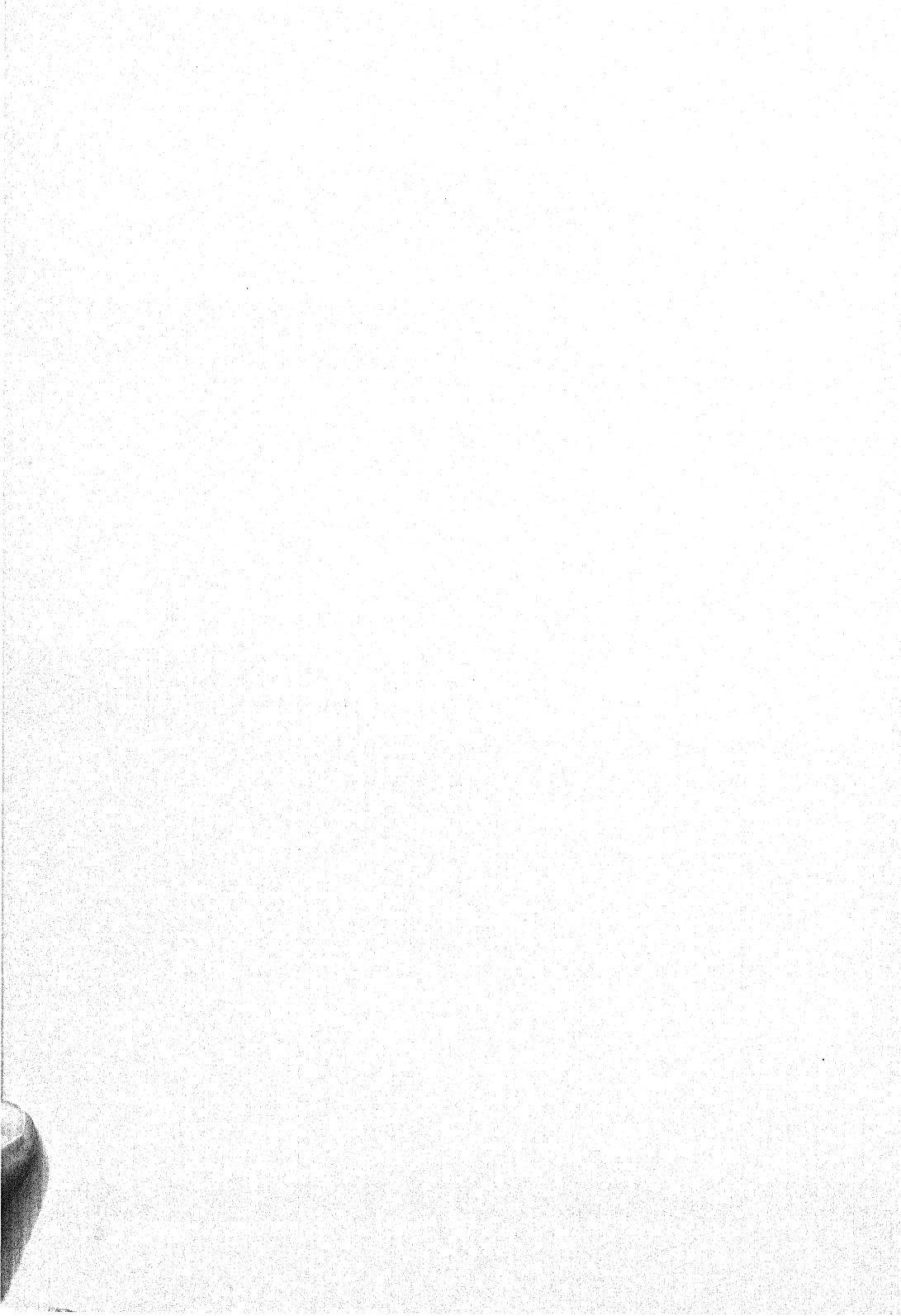
*New-York.* WILLIAM FLOYD,  
PHILIP LIVINGSTON,  
FRANCIS LEWIS,  
LEWIS MORRIS.

*New-Jersey.* RICHARD STOCKTON,  
JOHN WITHERSPOON,  
FRANCIS HOPKINSON,  
JOHN HART,  
ABRAHAM CLARK.

*Pennsylvania.* ROBERT MORRIS,  
BENJAMIN RUSH  
BENJAMIN FRANKLIN,  
JOHN MORTON,  
GEORGE CLYMER,  
JAMES SMITH,  
GEORGE TAYLOR,  
JAMES WILSON,  
GEORGE ROSS.



<i>Delaware.</i>	CAESAR RODNEY, GEORGE READ, THOMAS MCKEAN.
<i>Maryland.</i>	SAMUEL CHASE, WILLIAM PACA, THOMAS STONE, CHARLES CARROLL, of Carrollton.
<i>Virginia.</i>	GEORGE WYTHE, RICHARD HENRY LEE, THOMAS JEFFERSON, BENJAMIN HARRISON, THOMAS NELSON, jun. FRANCIS LIGHTFOOT LEE, CARTER BRAXTON.
<i>North-Carolina.</i>	WILLIAM HOOPER, JOSEPH HEWES, JOHN PENN.
<i>South-Carolina.</i>	EDWARD RUTLEDGE, THOMAS HEYWARD, jun. THOMAS LYNCH, jun. ARTHUR MIDDLETON.
<i>Georgia.</i>	BUTTON GWINNETT, LYMAN HALL, GEORGE WALTON.



Appendix II

THE CONSTITUTION OF THE  
UNITED STATES



# CONSTITUTION OF THE UNITED STATES—1787

WE THE PEOPLE of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION for the United States of America.

## ARTICLE I.

### *Congress.*

§ 1. CONGRESS. — All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

§ 2. HOUSE OF REPRESENTATIVES. — The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

\*[Representatives and direct taxes shall be apportioned among the several States which may be in-

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\*The clause included in brackets is amended by the 14th amendment, second section.

cluded within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

§ 3. SENATE.—The Senate of the United States shall be composed of two senators from each State, chosen by the Legislature thereof, for six years; and each senator shall have one vote. [See 17th amendment.]

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expira-

tion of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies. [See 17th amendment.]

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

§ 4. ELECTION OF SENATORS AND REPRESENTATIVES; SESSIONS OF CONGRESS.—The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

§ 5. CONGRESS AS JUDGE OF ELECTION AND QUALIFICATIONS OF MEMBERS; QUORUM; PROCEDURE; JOURNAL; ADJOURNMENTS.—Each House shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.



§ 6. COMPENSATION OF MEMBERS; ARREST; DEBATE; HOLDING OTHER OFFICE. — The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either House during his continuance in office.

§ 7. REVENUE BILLS; APPROVAL OF LAWS BY PRESIDENT.—All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that

House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

§ 8. POWERS OF CONGRESS. — The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of

foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all Cases what-

soever, over such District (not exceeding ten Miles square) as may, by Session of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other Powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

§ 9. LIMITATIONS ON LEGISLATION; TITLES OF NOBILITY; FOREIGN PRESENTS, EMOLUMENTS OR OFFICES. — The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto law shall be passed.

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those

of another: nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any King, Prince, or foreign State.

§ 10. LIMITATIONS ON STATES.—No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage

in war, unless actually invaded, or in such imminent danger as will not admit of delay.

## ARTICLE II.

### *Executive Department.*

§ 1. PRESIDENT AND VICE-PRESIDENT. — The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected, as follows:

Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole

number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said house shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; A quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.]

NOTE.—This clause has been superseded by the twelfth amendment.

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall

devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

§ 2. POWERS OF PRESIDENT. — The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the



Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

§ 3. MESSAGES TO CONGRESS; SPECIAL SESSIONS AND ADJOURNMENTS; MINISTERS; EXECUTION OF LAWS; OFFICIAL COMMISSIONS.—He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

§ 4. IMPEACHMENT OF OFFICERS. — The President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

## ARTICLE III.

*Judiciary.*

§ 1. COURTS AND JUDGES.—The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

§ 2. JUDICIAL POWER AND JURISDICTION; CRIMES.—The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party; —to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States, — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

§ 3. TREASON. — Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attained.

#### ARTICLE IV.

##### *Citizenship; States and Territories.*

§ 1. FULL FAITH AND CREDIT CLAUSE. — Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

§ 2. CITIZENSHIP; EXTRADITION. — The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive au-

thority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

§ 3. NEW STATES AND TERRITORIES.—New States may be admitted by the Congress into this union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislature of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

§ 4. PROTECTION AND AID OF STATES.—The United States shall guarantee to every State in this Union a Republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the executive (when the Legislature cannot be convened) against domestic violence.

#### ARTICLE V.

##### *Proposal and Ratification of Amendments.*

The Congress, whenever two-thirds of both Houses

shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

#### ARTICLE VI.

##### *General Provisions.*

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound

by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

## ARTICLE VII.

### *Time When Constitution Effective.*

The ratification of the conventions of nine States, shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the TWELFTH IN WITNESS whereof We have hereunto subscribed our Names.

NOTE: For the names of the thirty-nine delegates who signed the Constitution, see page 47.

IN CONVENTION Monday September 17th, 1787.

Present

The States of

New Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia:

RESOLVED,

That the preceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in

each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled.

Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention

GO. WASHINGTON Presidt.

W. JACKSON Secretary.

# AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLES in addition to, and amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth article of the original Constitution.

## ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## ARTICLE II.

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

## ARTICLE III.

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

## ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the



place to be searched, and the persons or things to be seized.

#### ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

#### ARTICLE VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

## ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## ARTICLE IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

## ARTICLE XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

## ARTICLE XII.

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists

they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall

be eligible to that of Vice-President of the United States.

### ARTICLE XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

### ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants

of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SEC. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## ARTICLE XV.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.

## ARTICLE XVI.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

## ARTICLE XVII.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

## ARTICLE XVIII.

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

## ARTICLE XIX.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

## ARTICLE XX.

(Proposed)

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SEC. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SEC. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SEC. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SEC. 5. Sections 1 and 2 shall take effect on the 15th of October following the ratification of this article.

SEC. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.



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